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In The

Supreme Court of the United States

INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a noncitizen is ordered removed (deported) from the United States, she is entitled by statute to file a single, timely motion to reopen the proceeding before the immigration judge (IJ) or Board of Immigration Appeals (BIA). 8 U.S.C. § 1229a(c)(7)(A) (2006). The statute does not require the noncitizen to be physically present in the United States when her motion is filed, pending, or decided. If, however, the noncitizen complies with the order to depart by leaving the country, the IJ or BIA will refuse to entertain the motion, or any appeal, based on administrative regulations known as the post-departure bar. 8 C.F.R. §§ 1003.2(d), 1003.4, 1003.23(b)(1) (2010).

The question presented is:

> Must a noncitizen who has complied with an order to depart be afforded her right, under 8 U.S.C. § 1229a(c)(7)(A), to have her single, timely motion to reopen considered on its merits, notwithstanding 8 C.F.R. § 1003.2(d)?

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INTRODUCTION

Indah Estalita respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The panel opinion of the Tenth Circuit, which relied upon prior published circuit precedent, is unreported but available at 2010 WL 2340814 and reprinted at App. 1. The Tenth Circuit's order denying rehearing en banc is unreported but reprinted at App. 33. The initial decision of the immigration judge (IJ) (App. 7) and affirmance of that decision by the Board of Immigration Appeals (BIA) (App. 23) are unreported. The BIA's order granting petitioner's motion to reopen is unreported but available at 2004 WL 2374716 and reprinted at App. 25. The IJ's termination for lack of jurisdiction (App. 27) and the BIA's later order vacating the reopening (App. 29) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 11, 2010. It denied a timely petition for rehearing en banc on July 27, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 8, U.S. Code § 1229a(c) (2006), which was enacted as § 240(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, provides, in relevant part:

> **(c) Decision and burden of proof**
>
> * * *
>
> **(6) Motions to reconsider**
>
> **(A) In general**
>
> The alien may file one motion to reconsider a decision that the alien is removable from the United States.
>
> * * *
>
> **(7) Motions to reopen**
>
> **(A) In general**
>
> An alien may file one motion to reopen proceedings under this section . . . .

Title 8, Code of Federal Regulations § 1003.2 (2010) provides, in relevant part:

> (d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including

> the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

STATEMENT OF THE CASE

By statute, Congress has authorized any noncitizen who is ordered removed from the United States to file a motion to reopen the removal proceeding and introduce new evidence. The decision below, however, upheld an administrative regulation that deprives the BIA of jurisdiction to reopen the proceeding once the noncitizen has departed the United States, even under compulsion of an order to depart.

The courts of appeals are divided three ways on the effect of this post-departure bar: Two circuits hold that the BIA must reopen the proceeding and consider the merits, notwithstanding the bar, even when the noncitizen has left the country. Two reach the same conclusion for cases in which the noncitizen was compelled to depart. And two circuits expressly uphold the post-departure bar, joined by four other circuits that assume its validity and apply it repeatedly.

This extensive, entrenched circuit split has been acknowledged not only by the courts of appeals but also by the Acting Solicitor General. If this case had

arisen in the Fourth, Sixth, Seventh, or Ninth Circuit, the BIA would have been required to adjudicate petitioner's motion on the merits. Because of the procedural posture of this case, it is clear that petitioner would have received her requested relief and not been subject to removal.

This issue is extremely important and arises frequently. Summary administrative proceedings, ineffective assistance of counsel, and (as here) new evidence and changed circumstances often necessitate correction. Motions to reopen are an "important safeguard" against these errors and omissions. *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008). By making these statutory safeguards unavailable to noncitizens like petitioner, the Tenth Circuit's rule violates the statute's text, structure, purpose, and enactment history.

Finally, this case is an excellent vehicle. Unlike previous certiorari petitions raising this issue, it involves a first, timely motion to reopen rather than an untimely or successive motion implicating only the agency's discretion to reopen *sua sponte*. Further review is warranted.

A. Statutory and Regulatory Background

1. In immigration law, removal encompasses what was formerly known as deportation. The removal process begins when the government files a Notice to Appear with an IJ. The Notice states the grounds upon which the noncitizen should be removed.

8 U.S.C. § 1229(a)(1) (2006). If the IJ determines that the noncitizen is removable, the IJ enters a removal order.

The noncitizen may appeal an IJ's initial decision to the BIA. If the BIA affirms the IJ's decision or the noncitizen does not file a timely appeal, the removal order becomes final. *Id.* § 1101(a)(47)(B). A noncitizen may seek further review of a final removal order in one of two ways. First, she may seek judicial review immediately by filing a petition for review in the court of appeals for the circuit in which the original proceeding took place. *Id.* § 1252(a)(5). Alternatively, she may seek administrative review by filing a motion to reopen, a motion to reconsider, or both.[1] *Id.* § 1229a(c)(6), (c)(7). Motions to reopen allow noncitizens to present evidence that was unavailable during the initial proceedings. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3) (2010). Motions to reconsider let noncitizens challenge factual or legal findings made in the initial proceedings, or procedural irregularities such as ineffective assistance of counsel. *See id.* §§ 1003.2(b)(1), 1003.23(b)(2).

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[1] Usually, the alien will file the motion to reopen or reconsider with the BIA. If, however, the BIA never took jurisdiction of the case (when, for example, an alien failed to file a timely BIA appeal), the alien must file the motion to reopen or reconsider directly with the IJ. *See* BIA Practice Manual App. K (Where to File a Motion), *available at* http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm.

For decades, the right to file a motion to reopen or reconsider was entirely a creature of regulation. But when Congress enacted IIRIRA in 1996, it expressly granted every noncitizen the rights to file "one motion to reopen" and "one motion to reconsider" within ninety and thirty days, respectively. IIRIRA § 304(a)(3), 110 Stat. 3009-593 (codified at 8 U.S.C. § 1229a(c)(6), (c)(7) (2006)). The BIA also has the authority to reopen or reconsider a noncitizen's proceedings *sua sponte*. 8 C.F.R. § 1003.2(a).

2. The so-called post-departure bar is an administrative rule that extinguishes the right to file motions to reopen or reconsider (or an administrative appeal) by any noncitizen who departs the United States after the initial removal decision. 17 Fed. Reg. 11,475-11,476 (Dec. 19, 1952) (codified at 8 C.F.R. pts. 6.2, 6.12 (1952)). The administrative post-departure bar originally paralleled the language of a statutory post-departure bar to judicial review of a noncitizen's removal order. *See* 8 U.S.C. § 1105a(c) (1964). The statutory bar to judicial review differed from the administrative bar, however, in that the judicial-review bar was coupled with an automatic-stay provision that permitted a noncitizen to remain within the United States until all pending judicial proceedings were completed. 8 U.S.C. § 1105a(a)(3) (1964). The administrative post-departure bar on motions to reopen or reconsider contained no equivalent stay provision. Noncitizens were thus caught "between Scylla and Charybdis": if they left, they

would be treated as abandoning their motions, but if they overstayed, they would become ineligible to adjust status or cancel removal for the next ten years. *Dada*, 128 S. Ct. at 2318.

While the statutory language has changed substantially in recent decades, the regulatory landscape has not. The language of the administrative post-departure bar, which has remained substantially the same since 1952, provides:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d) (2010) (governing motions to reopen BIA proceedings). A near-verbatim regulation governs motions to reopen or reconsider before an IJ. *Id.* § 1003.23(b)(1). The same rule, worded slightly differently, governs appeals pending before the BIA. *Id.* § 1003.4. As the Seventh Circuit has recognized, these are all "equivalent regulations." *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 594 (7th Cir. 2010); *see also Rosillo-Puga* v. *Holder*, 580 F.3d 1147, 1158 n.6 (10th Cir. 2009) (noting that §§ 1003.2(d) and

1003.23(b)(1) "contain identical language"), *reh'g en banc denied* (10th Cir. Dec. 8, 2009), *cert pending* (No. 09-1367); *Coyt* v. *Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) (describing §§ 1003.2(d) and 1003.23(b)(1) as "nearly identical provision[s]").

3. As part of IIRIRA's reform of immigration procedures, Congress repealed the post-departure bar to judicial review, as well as its companion automatic-stay provision. IIRIRA § 306(b), 110 Stat. 3009-612. While it expressly codified a noncitizen's right to file one timely motion to reopen and one timely motion to reconsider a removal decision, IIRIRA did not codify or even mention the administrative post-departure bar. Nevertheless, when the Department of Justice promulgated regulations implementing IIRIRA, it retained the administrative post-departure bar. *See* 62 Fed. Reg. 10,321 (Mar. 6, 1997) (also explaining the Attorney General's position that "[n]o provision of the new [statutory] section [repealing the judicial post-departure bar] supports reversing the long established [administrative post-departure bar]").

B. Removal Proceedings

Indah Estalita, a citizen of Indonesia, lawfully entered the United States on a B-2 tourist visa on October 18, 2000. On April 18, 2001, while in the United States, she applied for asylum for herself, her

husband, and her two youngest children.[2] Three months later, the Immigration and Naturalization Service (the predecessor to the Department of Homeland Security (DHS)) referred her application to the Denver Immigration Court, thus beginning proceedings to remove her from the country.

On May 29, 2002, an IJ denied Estalita's application for asylum and entered an order of voluntary departure or (in the alternative) removal. App. 20-21. The order required her to depart the United States or risk serious consequences, including losing her right to adjust her status for the next ten years. *See Dada*, 128 S. Ct. at 2318. The BIA affirmed the order on May 13, 2004 and imposed a new so-called voluntary-departure deadline of June 12, 2004. App. 23. DHS later extended the departure period by one month, to July 12, 2004.

C. Motion to Reopen

On April 30, 2001, shortly after Estalita applied for asylum, a Colorado employer had filed for a labor certification with the Department of Labor, seeking permission to employ Estalita. Three years later, after the BIA had affirmed the IJ's departure order,

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[2] In light of a series of church bombings and lethal attacks on Christians in Indonesia, Estalita feared religious persecution as a Christian in a predominantly Muslim country. Her fear was heightened because of her interfaith marriage to a Muslim (who has since converted to Christianity).

the Department of Labor approved that labor certification on June 16, 2004.[3] On July 7, 2004, Estalita moved to reopen her removal proceedings based on this new evidence and her changed circumstances. Her motion satisfied every statutory requirement. It was her only motion to reopen, as specified by the statute, and she filed it within the statute's ninety-day time limit. 8 U.S.C. § 1229a(c)(7)(A), (C)(i) (2006).

Because the BIA had stressed the serious consequences of not complying with the departure order, Estalita returned to Indonesia under DHS's supervision on July 12, 2004, the day by which she was required to leave.[4] She was forced to leave even though her motion to reopen was still pending.

Unaware that Estalita had left the United States, the BIA *granted* her motion to reopen the proceeding on August 5, 2004. It remanded her case to the IJ,

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[3] The Department of Labor's approval of the labor certification was predicated on its finding that "(I) there [were] not sufficient workers who [were] able, willing, qualified . . . and available at the time of [Estalita's] application for a visa and admission to the United States and at the place where [she was] to perform such . . . labor, and (II) the employment of [Estalita would] not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A)(i) (2006). Despite the long delay, the employer remains willing to employ Estalita.

[4] Estalita flew from Denver to Los Angeles the night of July 11, presented herself at the INS office in the LAX airport shortly thereafter, and on July 12 flew from Los Angeles to Hong Kong and from there to Jakarta, Indonesia. *See* R85.

citing DHS's "non-opposition, and [Estalita's] apparent colorable eligibility for adjustment of status." App. 26.

On August 10, 2004, Estalita and her family reentered the United States at the Los Angeles International Airport. The immigration officer there interviewed them and determined that they had a credible fear of religious persecution in Indonesia. After detaining them for nearly a month and confiscating their passports, DHS allowed them into the country pending a determination of this renewed asylum claim. The family is now present on a temporary humanitarian parole, 8 U.S.C. § 1182(d)(5) (2006); there has not yet been a final determination of this asylum claim. Thus, Estalita and her family have no visas, passports, or permanent status. They cannot lawfully work here or freely leave and reenter the country.

Once DHS learned that Estalita had departed the country to comply with her departure order (albeit briefly and under compulsion), it moved to rescind the reopening. Agreeing that he no longer had jurisdiction over the motion because of Estalita's departure, the IJ terminated the proceedings for lack of jurisdiction on November 1, 2005. App. 27. On June 20, 2007, the BIA vacated its August 2004 order reopening the proceedings and dismissed Estalita's appeal of the IJ's November 2005 decision. It held that under 8 C.F.R. § 1003.2(d), her departure necessarily withdrew her motion to reopen and deprived the BIA of jurisdiction. App. 30.

D. Tenth Circuit Decision

After exhausting her administrative appeals, Estalita petitioned the Tenth Circuit for review. She argued that § 1003.2(d) is invalid because it "directly conflicts" with 8 U.S.C. § 1229a(c)(7)(A) (2006). App. 4.

Before the Tenth Circuit resolved Estalita's petition, another panel of the Tenth Circuit upheld the administrative post-departure bar in another case, in a fractured 2-1 decision in which each of the three judges wrote separately. *Rosillo-Puga,* 580 F.3d at 1156-58. The majority stated that IIRIRA was silent on whether Congress "meant to repeal the post-departure bars." *Id.* at 1156. Applying *Chevron* deference and expressly rejecting the Fourth Circuit's contrary conclusion, *Rosillo-Puga* then concluded that the regulation was "'based on a permissible construction of the statute.'" *Id.* at 1157 (quoting *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984)). Distinguishing this Court's decision in *Dada*, and over Judge Lucero's strong dissent, *Rosillo-Puga* held that § 1003.23(b)(1), like § 1003.2(d), was valid and foreclosed reopening. *Rosillo-Puga*, 580 F.3d at 1156-58.

A different Tenth Circuit panel ruled on Estalita's petition. While it noted that Estalita's case was "more sympathetic," the panel concluded that it was "bound by [the *Rosillo-Puga*] precedent." App. 6. The panel below reiterated *Rosillo-Puga*'s conclusion that § 1003.2(d) "deprives the BIA . . . of jurisdiction over

motions to reopen filed by aliens who departed the United States following completion of their removal proceedings." App. 4-5. By obeying the voluntary departure order, it held, Estalita had waived her right to reopen her case to inform the BIA of her employment authorization. The Tenth Circuit then denied Estalita's petition for rehearing en banc. App. 33.

REASONS FOR GRANTING THE WRIT

Review is needed to resolve a question this Court has expressly left open, on which the circuits are in recognized disagreement, which profoundly affects many thousands of immigrants' lives.

In *Dada*, this Court noted reasons to question whether the administrative post-departure bar remains valid after IIRIRA but expressly left that question open. 128 S.Ct. at 2318. The courts of appeals are divided on whether the bar validly deprives the BIA of jurisdiction or prevents it from considering the merits of statutorily authorized motions to reopen: Two circuits reject the bar, two reject it for noncitizens forced to depart, and two expressly uphold its validity. Four other circuits have repeatedly assumed its validity and applied it without detailed analysis.

Thus, four circuits would have reached a different result in this case: they would have remanded for consideration on the merits despite Estalita's

compelled departure. This circuit split is mature and entrenched. The circuits have expressly agreed or disagreed with one another's holdings and reasoning, recognized the circuit conflict, and denied rehearing en banc.

The decision below frustrates IIRIRA's text, structure, purpose, and enactment history. IIRIRA guarantees a noncitizen one motion to reopen to encourage noncitizens to depart without forfeiting their statutory right to contest the decision. The administrative post-departure bar perversely construes a noncitizen's departure, even if compelled by the government, as a choice to "withdraw[] such motion." 8 C.F.R. § 1003.2(d). Because the issue is of great importance, recurs frequently, and is presented cleanly here in the context of a first, timely motion, further review is imperative.

ARGUMENT

I. THE CIRCUITS ARE DIVIDED ON WHETHER, ONCE A NONCITIZEN DEPARTS THE COUNTRY, THE BIA MUST CONSIDER ON THE MERITS A FIRST, TIMELY MOTION TO REOPEN OR RECONSIDER

The courts of appeals have fractured 2-2-2 over whether the BIA must consider on the merits a first, timely motion to reopen or reconsider, or an administrative appeal, once a noncitizen obeys an order to

depart. The Fourth and Seventh Circuits have expressly held that 8 C.F.R. § 1003.2(d) does not validly prevent the BIA from considering motions to reopen on the merits. The First and Tenth Circuits have rejected this view and upheld the post-departure bar. As a practical matter, they are joined by the Second, Third, Fifth, and Eleventh Circuits, which assume the bar's validity and repeatedly apply it to foreclose review. Finally, the Sixth and Ninth Circuits take an intermediate position, holding that the post-departure bar does not apply when a noncitizen is compelled to depart. In practice, these two circuits will usually reach the same result as the Fourth and Seventh Circuits, since even a so-called voluntary departure is usually compelled by an order to depart.

Thus, if this case had arisen in the Fourth, Seventh, Sixth, or Ninth Circuit, it would have come out differently. The split is entrenched, acknowledged by the courts of appeals and the Acting Solicitor General, and ripe for this Court's review.

A. Two Circuits Hold That the BIA Must Entertain Post-Departure Motions on the Merits

The Fourth and Seventh Circuits have expressly rejected the BIA's refusal to entertain motions by aliens who are not present in the United States. As the Fourth Circuit has held, "§ 1229a(c)(7)(A) [of IIRIRA] clearly and unambiguously grants a noncitizen the right to file one motion to reopen, regardless

of whether he is present in the United States when the motion is filed." *William* v. *Gonzalez*, 499 F.3d 329, 333 (4th Cir. 2007), *reh'g en banc denied* (4th Cir. Nov. 7, 2007). Thus, the court explained, "§ 1003.2(d), containing the post-departure bar on motions to reopen, conflicts with the statute by restricting the availability of motions to reopen to those who remain in the United States." *Id.* at 334. Conducting a *Chevron* analysis, the court found the statute unambiguous. *Id.* at 332. It thus held that "this regulation lacks authority and is invalid." *Id.* at 334. The Fourth Circuit still adheres to this position. *See Sadhvani* v. *Holder*, 596 F.3d 180, 183 (4th Cir. 2009).

The Seventh Circuit has adopted "the holding in *William* – though on a rationale distinct from the [F]ourth [C]ircuit's." *Marin-Rodriguez*, 612 F.3d at 594. Writing for that court, Chief Judge Easterbrook stressed that "nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction' – which is to say, adjudicatory competence – to issue decisions that affect the legal rights of departed aliens." *Id.* (citation omitted). The Seventh Circuit thus rejected the BIA's contention that it cannot entertain motions to reopen or reconsider on the merits after a noncitizen has departed the country. It granted the petition for review and remanded the case to the BIA to consider the motion on its merits. *Id.* at 595-96.

B. Two Circuits Hold, and Four More Assume, That the Post-Departure Bar Is Valid

The First and Tenth Circuits firmly hold that 8 C.F.R. § 1003.2(d) and parallel post-departure bar regulations validly prevent the BIA from considering motions to reopen on the merits. The First Circuit has denied a noncitizen his statutory right to file a single motion to reopen because he had physically departed the United States. *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-43 (1st Cir. 2007), *reh'g en banc denied*, 510 F.3d 350 (1st Cir. 2007), *cert. denied*, 129 S. Ct. 37 (2008). The court reasoned that while the government "may be overreaching" in claiming that Congress affirmatively intended to retain the regulatory post-departure bar, "the Attorney General's interpretation of the effect of the statutory change on the regulatory bar" was a reasonable one. *Id.* at 443.

The Tenth Circuit relied on this First Circuit decision to reach the same result. *Rosillo-Puga*, 580 F.3d at 1156 (citing *Pena-Muriel*, 489 F.3d at 442); *see also* Br. in Opp., *Rosillo-Puga* v. *Holder*, No. 09-1367, at 20 (U.S. Sept. 27, 2010) [hereinafter *Rosillo-Puga* BIO] (noting that "the First Circuit's conclusion is consistent with" *Rosillo-Puga*). In *Rosillo-Puga*, the Tenth Circuit observed that "the validity of the regulations continuing to impose a post-departure bar [§§ 1003.2(d) and 1003.23(b)(1)], and their applicability to Rosillo-Puga, are at the heart of this case." 580 F.3d at 1152-53. The Tenth Circuit expressly rejected the Fourth Circuit's holding in *William*, agreeing with

the *William* dissent that "§ 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(6)(A) or (7)(A)." 580 F.3d at 1156.

In the decision below, the Tenth Circuit adhered to and applied *Rosillo-Puga*'s holding. While acknowledging that Estalita's case "may be more sympathetic" than Rosillo-Puga's, the panel acknowledged that it was "bound by precedent." App. 6. As the court below noted, *Rosillo-Puga* broadly upheld the validity of "the post-departure bar in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), [which] deprives the BIA or immigration judges of jurisdiction over motions to reopen filed by aliens who departed the United States . . . ." App. 4-5.

Consistent with the First and Tenth Circuits' decisions, the Second, Third, Fifth, and Eleventh Circuits have assumed that § 1003.2(d) is valid and so divests the BIA of jurisdiction to hear motions to reopen.[5] Though these circuits have not analyzed the

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[5] *E.g.*, *Zhang* v. *Holder*, No. 09-2628-ag, 2010 WL 3169292, at *6 (2d Cir. Aug. 12, 2010); *Singh* v. *Gonzales*, 468 F.3d 135, 140 (2d Cir. 2006); *Ahmad* v. *Gonzales*, 204 F. App'x 98, 99 (2d Cir. 2006) (unpublished summary order); *Jalloh* v. *Gonzales*, 181 F. App'x 131, 132 (2d Cir. 2006) (unpublished summary order); *Tahiraj-Dauti* v. *Att'y Gen. of the U.S.*, 323 F. App'x 138, 139 (3d Cir. 2009) (unpublished); *Grewal* v. *Att'y Gen. of the U.S.*, 251 F. App'x 114, 115-16 & n.2 (3d Cir. 2007) (unpublished); *Oladokun* v. *Att'y Gen. of the U.S.*, 207 F. App'x 254, 256-57 (3d Cir. 2006) (unpublished); *Marsan* v. *Att'y Gen. of the U.S.*, 199 F. App'x 159,

(Continued on following page)

regulation's validity, in more than a dozen cases they have assumed it and applied the post-departure bar to noncitizens like Estalita.

C. Two Circuits Refuse to Apply the Bar to Noncitizens Who Were Compelled to Depart

As the Seventh Circuit has recognized, the Sixth and Ninth Circuits have adopted an intermediate position. They have "held that § 1003.2(d) and equivalent regulations do not apply when the alien is removed involuntarily – in other words, that it makes sense to treat departure from the United States as the withdrawal of a motion only when the alien could have remained to see the litigation through." *Marin-Rodriguez*, 612 F.3d at 594.

In *Madrigal* v. *Holder*, the Sixth Circuit held that the administrative post-departure bar in § 1003.4 does not validly withdraw an administrative appeal where a noncitizen is forcibly removed. 572 F.3d 239, 244-45 (6th Cir. 2009). The Sixth Circuit held: "To allow the government to cut off Madrigal's statutory right to appeal an adverse decision . . . simply by

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165 (3d Cir. 2006) (unpublished per curiam); *Toora* v. *Holder*, 603 F.3d 282, 288 (5th Cir. 2010); *Castillo-Perales* v. *Mukasey*, 298 F. App'x 366, 369 (5th Cir. 2008) (unpublished per curiam); *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003); *Sankar* v. *U.S. Att'y Gen.*, 284 F. App'x 798, 799 (11th Cir. 2008) (unpublished per curiam); *Ugokwe* v. *U.S. Att'y Gen.*, 453 F.3d 1325, 1330-31 (11th Cir. 2006).

removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process." *Id.* at 245. Conversely, freely chosen departures do bar motions to reopen in the Sixth Circuit. *See Ablahad* v. *Gonzales*, 217 F. App'x 470, 475 n.6 (6th Cir. 2007) (noting that noncitizen had traveled to Canada several times); *Mansour* v. *Gonzales*, 470 F.3d 1194, 1196, 1198-99 (6th Cir. 2006) (noting that drunk noncitizen at engagement party in El Paso, Texas had "accidentally travelled to Mexico").

The Ninth Circuit follows the Sixth, rejecting § 1003.2(d) as "invalid as applied to a forcibly removed petitioner." *Coyt*, 593 F.3d at 907-08 (citing and following *Madrigal*). As that court explained: "It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA." *Id.* at 907. Thus, "the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen." *Id.* In contrast, freely chosen departures do trigger the post-departure bar in the Ninth Circuit. *Aguilera-Ruiz* v. *Ashcroft*, 348 F.3d 835, 836-38 (9th Cir. 2003) (holding that an "entirely voluntary" trip "to Tijuana, Mexico to buy tequila, candies, and piñatas for a party" triggered § 1003.4's post-departure bar).

If this case had arisen in the Fourth or Seventh Circuit, either of those courts would have granted

Estelita's petition for review and required the BIA to consider her motion on its merits. The same would have been true in the Sixth and Ninth Circuit, because Estelita's so-called voluntary departure was voluntary in name only. *See Madrigal*, 572 F.3d at 244 n.4 (noting that "voluntary departure" is a term of art denoting an alien's departing at her own expense in lieu of removal and does not connote a free choice). She was ordered to depart or else be forcibly removed that same day. Failure to comply would have triggered a ten-year bar on applying for adjustment of status or cancellation of removal, plus thousands of dollars in civil penalties. App. 24. Neither the Sixth nor the Ninth Circuit would have construed her compelled departure as a free choice to withdraw her motion. Geography dictated the outcome here.

D. The Circuit Split Is Deep, Entrenched, and Acknowledged by the Circuits and the Acting Solicitor General

This deep, entrenched division in the courts of appeals calls out for this Court's review. The percolation has been extensive. The circuits acknowledge and discuss their disagreements with one another. *See, e.g.*, *Marin-Rodriguez*, 612 F.3d at 594 (Seventh Circuit notes that the Fourth and Seventh Circuits take one approach, the Sixth and Ninth Circuits take a second approach, and other circuits follow a third approach); *Zhang*, 2010 WL 3169292, at *3 n.2 (Second Circuit notes that "[t]his issue is presently the subject of a Circuit split," with the Fourth Circuit on

one side, the First and Tenth Circuits taking the opposite side, and the Ninth taking a third approach); *Ullah* v. *Holder*, No. 09-2101-ag, 2010 WL 2690311, at *2 n.2 (2d Cir. July 2, 2010) (summary order) (Second Circuit notes that the Fourth Circuit rejects the BIA's interpretation of the statute, the First and Tenth Circuits uphold it, and the Ninth Circuit takes a third approach); *Coyt*, 593 F.3d at 907 n.3 (Ninth Circuit notes that the Fourth and Tenth "[C]ircuits are split"); *Rosillo-Puga*, 580 F.3d at 1156 (Tenth Circuit majority opinion states that "[w]e agree with the dissent's position," explicitly rejecting the Fourth Circuit's majority opinion in *William*); *Rosillo-Puga,* 580 F.3d at 1162-67 (Lucero, J., dissenting) (Tenth Circuit dissent relies on the Fourth Circuit's majority opinion in *William*).

The six circuits squarely taking sides in the 2-2-2 split handled 56.9% of all petitions and appeals from the BIA in 2009. If one includes the Second, Third, Fifth, and Eleventh Circuits as well, that percentage rises to 99%. Administrative Office of the U.S. Courts, *2009 Annual Report of the Director: Judicial Business of the U.S. Courts* 94-99 tbl. B-3 (2009). Thus the conflict is widespread. Many, if not most, noncitizens face disparate treatment based solely on where they are located. The disparity could even encourage forum-shopping by noncitizens arriving in the country and deciding where to live.

The Tenth Circuit has denied rehearing en banc not only in the decision below but also in *Rosillo-Puga* and in *Mendiola* v. *Holder*, 585 F.3d 1303 (10th Cir.

2009), *reh'g en banc denied* (10th Cir. Dec. 30, 2009), *cert. pending* (No. 09-1378). The First Circuit has likewise denied rehearing en banc in *Pena-Muriel*, and the Fourth Circuit denied rehearing en banc in *William*.

In opposing certiorari in *Rosillo-Puga* and *Mendiola*, the Acting Solicitor General acknowledged a circuit split concerning timely motions to reopen but claimed that its scope was limited to the Fourth and Tenth Circuits. *Rosillo-Puga* BIO 21; Br. in Opp., *Mendiola* v. *Holder*, No. 09-1378, at 21 (U.S. Sept. 27, 2010) [hereinafter *Mendiola* BIO]. The split has grown in the few months since Rosillo-Puga and Mendiola filed their certiorari petitions: the Seventh Circuit in *Marin-Rodriguez* expressly took the Fourth Circuit's side of the split, thereby deepening and cementing it. The issue is now ripe for this Court's review.

II. THE TENTH CIRCUIT ERRED

The decision below is wrong. Although § 1229a(c)(7)(A) unequivocally gives the BIA responsibility to decide motions to reopen removal proceedings, the BIA refused to adjudicate Estalita's procedurally proper motion. Not only does the regulation diverge from the plain language of the statute, but IIRIRA's structure and enactment history confirm that Congress meant to repeal the bar altogether. Congress had good reason to do so, as the bar creates perverse incentives and is often inequitable.

A. The BIA Improperly Constricted Its Congressionally Conferred Jurisdiction to Adjudicate Noncitizens' Motions to Reopen Removal Proceedings

Jurisdiction is the "statutory or constitutional power to adjudicate [a] case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted). This power "can never be forfeited or waived," since adjudicative bodies "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *United States* v. *Cotton*, 535 U.S. 625, 630 (2002); *Marshall* v. *Marshall*, 547 U.S. 293, 298-99 (2006) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). "The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies." *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 590 (2009). Thus, "an administrative agency is not entitled to contract its own jurisdiction by regulations or by decisions in litigated proceedings." *Marin-Rodriguez*, 612 F.3d at 594.

Jurisdictional rules govern a tribunal's "power to hear a case." *Cotton*, 535 U.S. at 630. The BIA has no authority to limit its congressionally defined authority. As Chief Judge Easterbrook has noted, § 1229a(c)(7)(A) "does not make [reopening] depend on the alien's presence in the United States." *Marin-Rodriguez*, 612 F.3d at 594. "[N]othing in the statute undergirds a conclusion that the Board lacks 'jurisdiction' – which is to say, adjudicatory competence –

to issue decisions that affect the legal rights of departed aliens." *Id.* (citation omitted). While administrative regulation establishes the BIA, *see* 8 C.F.R. § 1003.1 (2010), the power to adjudicate a motion to reopen is specifically provided by statute. The BIA has no countervailing statutory authorization to constrict this jurisdiction. Thus, its refusal to adjudicate departed noncitizens' motions on the merits squarely conflicts with this Court's precedents.

B. Because the Statute Clearly Gives All Noncitizens the Right to File One Timely Motion to Reopen, the Post-Departure Bar Fails *Chevron*'s First Step

The plain language of § 1229a(c)(7)(A), as well as IIRIRA's structure and enactment history, gives all noncitizens in removal proceedings the right to file one timely motion to reopen. "If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see also INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (applying *Chevron* to an immigration case). Since Congress expressed its intent unambiguously, the post-departure bar cannot stand.

1. Section 1229a(c)(7)(A) provides: "An alien may file one motion to reopen proceedings under this section . . . ." Congress neither qualified the word "alien" nor distinguished between aliens (noncitizens)

inside or outside the United States. As long as there is just one motion and it is timely, as Estalita's motion was, it meets the requirements of § 1229a(c)(7). No provision in the statute suggests that Estalita is not entitled to have her motion to reopen judged on its merits.

When construing a statute, "[t]he first step is to determine whether the language at issue has a plain and unambiguous meaning . . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (internal quotation marks omitted). Section 1229a(c)(7) has a plain and unambiguous meaning, such that "there is no room left in the interpretive equation." *Rosillo-Puga*, 580 F.3d at 1168 (Lucero, J., dissenting). The Attorney General ignored that meaning by retaining the post-departure bar, thereby creating a geographical requirement nowhere found in the statute. Thus, § 1003.2(d) cannot bar a first, timely motion to reopen.

2. In applying *Chevron*'s first step, courts may use other tools of statutory interpretation beyond the particular provision's text. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Both the structure and enactment history of § 1229a(c)(7) and related provisions confirm Congress's unambiguous intent to repeal the post-departure bar.

If Congress had wanted to implement or approve a post-departure bar, it would have said as much.

"When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). Here, § 1229a(c)(7) contains several exceptions to or limitations upon the right to move to reopen: § 1229a(c)(7)(C)(i) imposes a filing deadline, § 1229a(c)(7)(B) sets out substantive requirements, and § 1229a(c)(7)(A) limits the number of motions allowed. Congress included these exceptions but no others; there is no reason to think it intended other exceptions but inadvertently omitted them.

Likewise, courts should show "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag* v. *Comm'r*, 501 U.S. 868, 877 (1991) (internal quotation marks omitted). On this point, § 1229a(c)(7)(C)(iv)(IV) is especially pertinent. That provision creates an exception to the usual filing deadlines for battered spouses, children, and parents, but requires a noncitizen to be "physically present in the United States at the time of filing the motion" to reopen. If § 1229a(c)(7)(A) already contained an implicit location requirement, there would have been no need to include § 1229a(c)(7)(C)(iv)(IV) as well. The expression of one physical-presence requirement excludes the implied inclusion of another elsewhere in the same subsection. *Cf., e.g.*, *Kucana* v. *Holder*, 130 S. Ct. 827, 838 (2010).

3. The history of IIRIRA's enactment further confirms the Tenth Circuit's error. Before IIRIRA, the Immigration and Nationality Act had contained a judicial post-departure bar, which prevented judges from reopening or reconsidering proceedings once noncitizens had departed the country. 8 U.S.C. § 1105a(c) (1994). That provision, however, was counterbalanced by an automatic stay of removal. 8 U.S.C. § 1105a(a)(3) (1994). The automatic stay allowed noncitizens to remain in the country pending consideration of their petitions for review, giving them a full opportunity to litigate their claims.

IIRIRA streamlined the appeals process and eliminated statutory barriers to pursuing relief from abroad. *See Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009). In particular, Congress repealed the judicial post-departure bar and the concomitant automatic-stay provision. *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a (1994)). Congress also passed § 1229a, codifying a series of regulations that had existed for decades. In § 1229a, Congress included number, timing, and evidence requirements, but it did not carry forward the previous post-departure bar.

Hence, Congress in effect *repealed* the administrative post-departure bar, just as it repealed the judicial post-departure bar. It did so as part of a comprehensive scheme to make noncitizens leave the country sooner (hence no stay) and instead pursue their appeals from abroad (hence no post-departure bar). When one reads these statutes "as a

symmetrical and coherent regulatory scheme and fit[s] . . . all parts into an harmonious whole," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted), the conclusion is inescapable: the post-departure bar conflicts with Congress's express mandate.

C. The Post-Departure Bar Perversely Discourages Noncitizens from Departing and Inequitably Allows the Government to Terminate Its Adversaries' Motions by Forcing Them to Leave the Country

The post-departure bar is a historical holdover that no longer fits today's immigration system. It was enacted decades ago, when slow communications and transportation made a noncitizen's departure as much a *de facto* withdrawal of a motion as a *de jure* one. The bar encourages noncitizens to resist voluntary departure and risk deportation, instead of allowing noncitizens to return home and litigate their status in absentia. It screens out possibly meritorious cases, not just frivolous ones.

As this Court has recognized, overturning the post-departure bar would make much sense: "A[n] . . . expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture, much as Congress has permitted with

respect to judicial review of a removal order." *Dada*, 128 S. Ct. at 2320.

The post-departure bar also inequitably lets the government terminate its adversaries' cases by forcing them to leave the country, either by removing them against their will or, as here, setting tight deadlines for voluntary departure. As Judge Kethledge wrote in another case, "[t]he government forcibly removed [the petitioner] from the United States, and now claims she abandoned her appeal because she left the country. To state that argument should be to refute it . . . ." *Madrigal*, 572 F.3d at 245-46 (Kethledge, J., concurring). The majority in *Madrigal* agreed: "To allow the government to cut off [the petitioner's] statutory right to appeal an adverse decision, in this manner, simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process." *Id.* at 245. The post-departure bar "is strange phraseology as applied to an alien whose departure was beyond his control; it amounts to saying that, by putting an alien on a bus, the agency may 'withdraw' its adversary's motion. It is unnatural to speak of one litigant withdrawing another's motion." *Marin-Rodriguez*, 612 F.3d at 593. This perverse reading of the statute cannot stand.

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE, AS MOTIONS TO REOPEN ARE VITAL IMMIGRATION SAFEGUARDS

1. As this Court recognized in *Kucana*, "[t]he motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." 130 S. Ct. at 834 (quoting *Dada*, 128 S. Ct. at 2318). Immigration law is "very complex," and noncitizens find themselves represented by inexperienced, overburdened, or ineffective counsel with "alarming frequency." *Ardestani* v. *INS*, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting); *Aris* v. *Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008).

In this case, Estalita's eligibility for employment changed dramatically once the Department of Labor approved her prospective employer's labor certification. This change in circumstances was sufficiently compelling that the BIA granted her motion to reopen and remanded her case to the IJ, citing DHS's "non-opposition, and [Estalita's] apparent colorable eligibility for adjustment of status." App. 26. It reversed itself only after learning that Estalita had left the country, which was irrelevant to the merits of her case and the fairness of the proceedings.

While not implicated in this case, motions to reopen are also important avenues to remedy ineffective representation in immigration proceedings. Many noncitizens have ineffective lawyers or no lawyers at all in their initial proceedings. *See, e.g.*,

Aris, 517 F.3d at 598, 601 (vacating a BIA decision because counsel had failed to file an application and had misinformed the client that there was no hearing); *Mai* v. *Gonzales*, 473 F.3d 162, 164, 166-67 (5th Cir. 2006) (remanding to the BIA on a motion to reopen to address the noncitizen's claim of ineffective assistance of counsel, where his lawyer had admitted to a ground for removal over the noncitizen's strong, corroborated denial); *Singh* v. *Ashcroft*, 367 F.3d 1182, 1184, 1190 (9th Cir. 2004) (ordering the BIA to reopen a petition of a noncitizen who proved that his lawyer had failed to file a brief).

2. Dramatic increases in the number of immigration cases have exacerbated the problems of poor representation and increased the need for motions to reopen as safeguards. After Congress enacted IIRIRA, the number of noncitizens removed from the United States jumped from 69,680 in 1996 to 114,432 in 1997. Office of Immigration Statistics, U.S. Dep't of Homeland Security, *2009 Yearbook of Immigration Statistics* 95 tbl.36 (2010). Since 1997, that number has continued to climb. More than 393,000 noncitizens were removed in 2009 alone, of whom more than two-thirds were non-criminal aliens. *Id.* at 103 tbl.38.

The increased volume of immigration cases has led the BIA to use single judges rather than panels of judges to adjudicate immigration appeals. Under current regulations "establish[ing] a streamlined appellate review procedure," a single member of the BIA is authorized to affirm an initial ruling summarily, "without issuing an opinion." Executive Office for

Immigration Review; Board of Immigration Appeals: *Streamlining*, 64 Fed. Reg. 56,135-56,136 (Oct. 18, 1999) (to be codified at 8 C.F.R. pt. 3). Since establishing this practice, the Department of Justice has subjected an increasing number of cases to this streamlined treatment while reducing the overall number of BIA members. Board of Immigration Appeals: *Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878-54,879 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3) (expanding these summary procedures to make them "the dominant method of adjudication for the large majority of cases before the" BIA).

The result is a scheme in which "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.). Within this framework, motions to reopen are crucial for correcting errors caused by poor representation or the streamlined review process, thereby improving the system's fairness and accuracy.

3. The government cannot credibly contest the importance of this issue. In two prior cases involving application of the post-departure bar, the Acting Solicitor General opposed certiorari but did not dispute the importance of the post-departure bar's validity and effect. *See Rosillo-Puga* BIO 11-23 (not disputing importance); *Mendiola* BIO 11-25 (same). Those briefs barely responded to the petitioners' importance arguments, merely questioning, in a single sentence, the percentage of BIA cases affected

by the circuit split. *Rosillo-Puga* BIO 21; *Mendiola* BIO 22. The government has not disputed that motions to reopen are vital safeguards in an ever-increasing number of cases.

IV. THIS CASE IS AN EXCELLENT VEHICLE

This case presents an ideal vehicle for considering whether the BIA may refuse to reopen a proceeding solely because the noncitizen has left the country. The Acting Solicitor General has twice urged this Court, if it wishes to consider the issue, to wait for "a case where the motion was filed within the time and numerical limits provided by" IIRIRA. *Mendiola* BIO 24; *see also Rosillo-Puga* BIO 23.

This is such a case. Estalita filed a single, timely motion to reopen, as expressly authorized by statute. The BIA affirmed the IJ's denial of asylum on May 13, 2004. Estalita filed her only motion to reopen on July 7, 2004, well within 90 days of the BIA's decision. Her motion fell squarely within IIRIRA, which the Acting Solicitor General concedes "confer[s] . . . privately enforceable rights on an alien." *Mendiola* BIO 23. Because Estalita indisputably satisfied all the statutory requirements, her case squarely implicates the conflict between IIRIRA and § 1003.2(d).

Nor does this case involve other complications cited by the government in opposing previous petitions for certiorari. In both *Mendiola* and *Rosillo-Puga*, the noncitizens had filed untimely motions to

reopen their proceedings, and Mendiola's motion was his second. The Acting Solicitor General therefore argued that the decisions not to reopen their proceedings *sua sponte* were "committed to agency discretion by law." *Mendiola* BIO 23 (internal quotation marks omitted); *Rosillo-Puga* BIO 22-23. Since Estalita complied with the statute and thus had a right to have her motion to reopen decided on its merits, the issue here is not complicated by concerns about agency discretion in deciding whether to reopen *sua sponte*. This case, unlike *Mendiola*, would not require this Court to make "difficult threshold determinations" about equitable tolling or any other procedural-defect doctrine before it reached the question presented. *Mendiola* BIO 24. Nor is there any alternative ground for affirmance such as the res judicata issue in *Mendiola*. *Id.* at 25.

Moreover, Estalita has consistently argued, in both the administrative and judicial proceedings below, that the post-departure bar conflicts with IIRIRA. *Cf. Mendiola* BIO 25 (noting that Mendiola had not raised his statutory argument until his court of appeals reply brief, and there devoted only a few pages to it). At the Tenth Circuit's direction, the parties to this case filed two rounds of supplemental briefs on whether the bar remains valid after IIRIRA and *Dada*, and how *Rosillo-Puga* and *Mendiola* apply to this case. In its opinion below, the Tenth Circuit discussed the validity of the post-departure bar at length.

This is also a clear case in which the outcome of the motion is already known. The BIA *granted* Estalita's motion before realizing that she had left the country. It also expressly observed in its order that she appeared to be "eligib[le] for adjustment of status." App. 26.

Thus, but for the post-departure bar, the BIA would have reopened Estalita's removal proceeding and vacated her removal order. The BIA vacated its reopening only after DHS pointed out that Estalita had returned to Indonesia to comply with her departure order. If this Court reverses the Tenth Circuit, the BIA will doubtless grant Estalita's motion on the merits as it did before. Indeed, the law-of-the-case doctrine may require it to do so.

In opposing certiorari in *Mendiola*, the Acting Solicitor General urged this Court to "await a better case for addressing" this issue. *Mendiola* BIO 24-25. This petition presents not only "a better case," but the ideal case in which to resolve the issue.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 15, 2010

2010 WL 2340814

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Indah ESTALITA, Petitioner,
v.
Eric H. HOLDER, Jr., United States Attorney General, Respondent.
No. 07-9553.

June 11, 2010.

Indah Estalita, Aurora, CO, Patrick Charles Hyde, Esq., Patrick C. Hyde, P.C., Denver, CO, for Petitioner.

DOH/EOIR/BIA, Falls Church, VA, Julie M. Iversen, Mark Christopher Walters, Ann M. Welhaf, United States Department of Justice, Office of Immigration Litigation, Washington, DC, Douglas Maurer, United States Immigration & Custom Enforcement, Denver, CO, for Respondent.

Before TACHA, EBEL, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT*

DEANELL REECE TACHA, Circuit Judge.

Indah Estalita, a native and citizen of Indonesia, petitions for review of an order of the Board of Immigration Appeals ("BIA") which affirmed the Immigration Judge's ("IJ") denial of Ms. Estalita's motion to reopen removal proceedings. The IJ ruled that he lacked jurisdiction over the motion under 8 C.F.R. § 1003.2(d). We take jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D), but DENY Ms. Estalita's petition for review because we conclude that her arguments are foreclosed by our decision in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir.2009).

I. BACKGROUND

Ms. Estalita originally entered the United States as a nonimmigrant visitor with authorization to remain until April 2001. At the end of her authorized stay, Ms. Estalita submitted an application for asylum for herself, her husband, and her two minor children with the Department of Homeland Security ("DHS"). DHS denied Ms. Estalita's asylum application and initiated removal proceedings. Ms. Estalita was charged as being removable under 8 U.S.C. § 1227(a)(1)(B) for having remained in the United

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

States without authorization after the expiration of her visa.

At a hearing on February 6, 2002, Ms. Estalita conceded removability and requested, among other forms of relief, voluntary departure. The IJ granted Ms. Estalita thirty days voluntary departure, with an alternate order of removal. Ms. Estalita appealed the decision to the BIA, which affirmed on May 13, 2004. Ms. Estalita's voluntary departure period, which had been tolled during her administrative appeal, was reinstated and set to expire on June 12, 2004. DHS subsequently granted Ms. Estalita an extension of the voluntary departure period until July 12, 2004.

On July 7, 2004, five days before the expiration of her voluntary departure period, Ms. Estalita filed a motion to reopen her removal proceedings with the BIA, seeking an adjustment of status based on a labor certification which had been approved June 16, 2004.[1] Four days later, while the motion to reopen was still

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[1] A labor certification is a determination by the Secretary of Labor that:

> (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

U.S.C. § 1182(a)(5)(A)(i).

pending, Ms. Estalita and her family departed the United States pursuant to the grant of voluntary departure.

Unaware of Ms. Estalita's departure, the BIA granted her motion to reopen on August 5, 2004, and remanded the case to the IJ. DHS subsequently filed a Motion to Terminate for Lack of Jurisdiction, contending the BIA lacked jurisdiction to rule on the motion because Ms. Estalita's departure constituted a withdrawal of her motion to reopen under 8 C.F.R. § 1003.2(d). The IJ agreed with the government and granted the motion to terminate. On appeal, the BIA determined it had erroneously granted Ms. Estalita's motion to reopen and vacated its earlier order. Ms. Estalita now petitions for review of the BIA's ruling that it lacked jurisdiction.

II. DISCUSSION

In support of her petition for review, Ms. Estalita argues that § 1003.2(d) is invalid because it directly conflicts with 8 U.S.C. § 1229a(c)(7)(A), which allows aliens subject to removal proceedings to file one motion to reopen. Ms. Estalita also contends that due process requires she be allowed to file one timely motion to reopen. The government asserts that our recent decision in *Rosillo-Puga* requires denial of Ms. Estalita's petition for review. We agree.

In *Rosillo-Puga,* we upheld the BIA's determination that the post-departure bar in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) deprives the BIA or

immigration judges of jurisdiction over motions to reopen filed by aliens who departed the United States following completion of their removal proceedings. 580 F.3d at 1160. Mr. Rosillo-Puga was removed from the United States pursuant to a removal order. *Id.* at 1149. Three-and-one-half years later, he filed a motion to reopen his removal proceedings. *Id.* After the IJ dismissed his appeal for lack of jurisdiction and the BIA affirmed, Mr. Rosillo-Puga filed a petition for review in this court. *Id.* He argued, inter alia, that the post-departure bar was unconstitutional and its application violated his due process rights. *Id.*

Employing *Chevron* deference, we concluded that the post-departure bar is a "valid exercise of the Attorney General's Congressionally-delegated rule-making authority." *Id.* at 1156. We found it "inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the Attorney General incorporating such a bar in his regulations." *Id.* at 1157. Therefore, we upheld the regulations as valid and denied Mr. Rosillo-Puga's petition for review. *Id.* at 1157, 1160. We also rejected Mr. Rosillo-Puga's due process argument, noting that in the context of deportation proceedings "due process requires that the alien receive notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal," both of which he had received. *Id.* at 1160 (quotations omitted).

Ms. Estalita contends that *Rosillo-Puga* is distinguishable on its facts. She correctly notes that Mr. Rosillo-Puga was not granted voluntary departure

and that he waived his right to appeal the removal order. *See id.* at 1149. But while the facts in this case may be more sympathetic, *Rosillo-Puga* upheld the very regulation at issue in this case and we are bound by precedent. *See In re Smith,* 10 F.3d 723, 724 (10th Cir.1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); *United States v. Meyers,* 200 F.3d 715, 720 (10th Cir.2000) ("The precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law."). Moreover, Ms. Estalita does not contend that the IJ or BIA misinterpreted or misapplied § 1003.2(d); indeed, the result in this case is clearly the one dictated by the regulation. Furthermore, Ms. Estalita received notice of the charges against her and was given the opportunity to be heard before the IJ and BIA; thus, she received all of the process to which she was entitled. Accordingly, the BIA properly determined that Ms. Estalita's departure from the United States during the pendency of her motion to reopen constituted a withdrawal of her motion and deprived it of jurisdiction.

III. CONCLUSION

For the foregoing reasons, we DENY Ms. Estalita's petition for review.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Denver, Colorado

File No.: A 79 468 924, 921, 922, 923 May 29, 2002

In the Matter of	)	
	)	
INDAH ESTALITA	)	IN REMOVAL
DONNIE RIDETE	)	PROCEEDINGS
LETICIA MERONDINI	)	
UDICART ANGGRAITO	)	
	)	
Respondents	)	

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Mr. Hyde, Esquire	Mr. O'Hare, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The first case before the Court is A 79 468 924, Indah Estalita. In this particular matter, the respondent entered the United States on October 18, 2000, as a nonimmigrant, B/2 with authorization to remain for a temporary period. The respondent remained beyond that particular period.

The next case is one of the children, Donnie Ridete, which is A 79 469 921. In this particular matter, the respondent child entered the United States on October 18, 2000, on a B/2 visitor visa, again for a temporary period remained over that time.

The next one is also one of the children, Leticia Merondini, A 79 468 922. Again, in this particular matter, this child entered the United States on or about October 18 of 2000, for a temporary period. She over exceeded that period. Again, the respondent did not leave when she was supposed to.

And the last case is A 79 468 923, Udicari Anggraito. The Court would indicate that he is the father and he came in first on June 23 of 2000, on a B/2 visitor visa for a temporary period which he exceeded.

This matter comes before the Court today as a result of form I-862 which is the Notice to Appear which was issued to the respondents on July 17, 2001, by the United States Immigration and Naturalization Service.

The Notice to Appear alleges that the respondents are removable pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended, in that after admission as nonimmigrants under Section 101(a)(15), that they remained in the United States longer than that which is permitted.

The issue of removability was resolved at a prior master calendar hearing where the respondents, through counsel, acknowledged proper service of the Notice to Appear, admitted allegations of fact contained therein, and conceded the charge of removability. Based on the evidence of record and the admissions of the respondents' counsel, this Court finds that removability has been established by clear, convincing and unequivocal evidence.

The respondent seek relief in the form of political asylum pursuant to section 208 of the Act, withholding of removability pursuant to Section 241(b)(3) of the Act in regards to their native country of Indonesia. In the alternatives, the respondents have requested voluntary departure pursuant to Section 240B of the Act. The Court would indicate that the Court does not grant the above-named relief, that the Court will look at 8 C.F.R. sub-section 208.13 which is withholding of removability under the Torture Convention Act.

The Court has received a copy of the *Country Reports on Human Rights Practices* for 2002 published by the State Department on Indonesia. This document was, in fact, submitted to the respondents' counsel and counsel for the Service and was admitted into evidence as Exhibit Number 3.

The respondents previously submitted a packet consisting of material regarding Indonesia, passports and so forth, all of that has been admitted into evidence and has been marked as Exhibit Number 4.

The respondents' request for asylum in the United States is on form I-589. That has been admitted into evidence and is Exhibit Number 3.

Exhibit Number 1 is the Notice to Appear in removal proceedings for every one of the individuals before the Court.

Statutory Requirements for Asylum and Withholding of Removability

Under Section 208 of the Immigration and Nationality Act, the Attorney General through an Immigration Judge may grant asylum as a matter of discretion to an individual who is a refugee within the meaning of Section 101(a)(42) of the Act. This provision requires that the respondent show that he or she is unable or unwilling to return to their native country and that they are unwilling or unable to avail themselves of the protection of that country on account of race, religion, nationality, membership in a particular social group or political opinion.

In this particular matter, the respondents have indicated religion. This is under Section 101(a)(42) of the Act.

In order to establish a well-founded fear of persecution:

(A) an alien must first of all show that he or she possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment or some sort;

(B) that the persecutor is already aware or could become aware that the alien possesses this belief of characteristic;

(C) that the persecutor has the capability of punishing the alien; and

(D) that the persecutor has the inclination to punish the alien.

This is *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987).

The United States Supreme Court has held that the well-founded fear standard requires a standard of showing that the fear of persecution is based on a reasonable possibility that such harm will, in fact, occur. Persecution is not defined in the Act but includes both the actual infliction of physical harm which is torture, prolonged detention, denial of an opportunity to earn a livelihood, restrictions on life and liberty and the threat that such harm will be imposed. *INS v. Stevic*, 467 U.S. 407 (1984).

Persecution will only provide a basis for asylum if it is inflicted at the hands of the government or group which the government is unable or unwilling to control.

Past Persecution

If an applicant establishes that he or she has been persecuted in the past under one of the five grounds enumerated in the statute, he or she is eligible for a grant of asylum. The likelihood of present or future persecution then becomes relevant as to the exercise of discretion and asylum may be denied as a matter of discretion if there is little likelihood of present persecution. *Matter of Chen*, Int. Dec. 3104 (BIA 1989).

Burden of Proof

The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in Section 101(a)(42) of the Act. In some cases, the only available evidence of the alien's subject fears may be the alien's own testimony. It can suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the aline's fears.

Withholding of Removability

In order to establish eligibility for withholding of removability, the respondent must show that his or her life or freedom would be threatened in the country for removability on account of race, religion, nationality, membership in a particular social group or political opinion. This is under Section 241(b)(3) of the Act. This statutory provision requires that the respondent demonstrate a clear probability of persecution on account of one of the five grounds enumerated in the Act.

This clear probability standard requires a showing that it is more likely than not that the alien would be subjected to persecution.

In this particular matter, the respondent has, the lead respondent who is the wife, Indah Estalita, did in fact testify that she was born in Indonesia on September 25, 1964, that she fears returning to Indonesia, that she was never physically tortured in

Indonesia, but she suffered greatly from mental torture. And the reason that she would suffer from this is because she is, in fact, a Christian.

She indicated that persecution stated way back with her grandmother was a Christian, that they suffered persecution because of the Christianity. She indicated that people would disturb services, that she would worry about going to the church, that this was a worry of her up until the 1998 riots because churches were being burned, people were being killed, that there were threats to destroy and burn the individuals in that particular church.

She said that part of her mother's family was, in fact, killed during this particular time, that a lady was, in fact, kidnaped coming back that church. She stated that, in fact, the kidnappers then called her boyfriend to come and get her and I'm assuming for monetary reasons that her boyfriend went to get her and that they were both killed. This individual's head was found at a later time. She thinks that these are people that were anti-Christian, that she thinks that the Islamics did this particular matter.

She indicated that on one occasion a friend of her sons told him that he would be better if he was Islamic to change his religion would be safer. The 1998 riots were because of religion. The Court would indicate that the Court has, in fact, on numerous occasions had individuals from Indonesia and has read the State Department report on many occasions. The 1998 riots were due to an economic situation.

The economic situation is that the Chinese that are considered non-indigenous people to that region are the people that are, in fact, people that hold the financial strings in that particular country. So, as soon as there are financial economic problems in that particular country, the indigenous people riot, they riot against the Chinese at that particular time, they did burn churches, they did burn homes, they did rape women, they did kill individuals.

The respondent also indicated that she had a friend that was called Valentina, that during the riot they tried to leave Indonesia, that a crowd stopped them and injured them. She indicated that her niece was, in fact, raped at the family home by individuals that were anti-Chinese, anti-Christian.

She indicated that on numerous occasions that she would get a call and told her not to go to church, that they would kill and burn anybody in that church. She indicates that she got her passport in Singapore, that they got them all at the same time, but they did not come at the same time because of the financial situation that they were in.

She said that her husband came first and she came in October, that she has approximately a year and a half of college, that on her identification from Indonesia that everything is in capital letters except Kristen which is not. She indicates she does not know why that is different from the rest of the lettering.

She indicates that she married a Moslem individual, that his parents were upset and his parents

were upset also. She indicated that her mother remains in Jakarta. Her father has been dead, that her mother has been to the United States but has gone back to Jakarta because she is old and involved in Christian activities, that she is a Protestant Christian.

She indicates that all four of her children are in the United States at this time. They are 15, 13, 10 and 8. She has nieces in Indonesia and also aunts and uncles that remain in Indonesia. She has approximately seven aunts and uncles.

The husband also testified and indicated that he, in fact, is Moslem, that he has a masters in business administration, that he was, in fact, in business banking, that he had a job at a bank, but was asked to leave because his friend didn't like the idea that he was married to a Christian, that another friend of his offered him a job, but as soon as he found out that he was, in fact, married to a Christian that, in fact, he was not asked to come to that particular country.

The Court in this particular matter would indicate that in conclusion the Court does not deny that the respondent does not want to return to Indonesia. However, the respondent's testimony has been considered along with the form I-589 and the materials submitted by the respondent. This Court finds that their unwillingness to return does not stem from persecution they may face on account of any of the five enumerated grounds necessary to grant the political asylum. The respondents have failed to show

past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act.

The respondents have failed to meet their burden of proof that anyone is interested in them due to any of the five enumerated grounds for asylum.

In this particular matter, the Court would indicate that the Court has read the State Department report on Indonesia. The Court is well aware that there are problems between the Christians and the Moslems and has been going on for quite some time, that there is, in fact, a fundamentalist Islamic group that does, in fact, destroy churches and harass the Christians. In this particular matter, the Court would indicate that there has been a change in country circumstances, that there is a new president by the name of Megawadi, that President Megawadi has declared under a presidential decree that all religions should be tolerated and that they are free to, in fact, worship as they wish.

The Court would also indicate that in this particular matter one of the Christian religions that is, in fact, looked at in good favor is, in fact, the Protestant Christian religion which is individual that she has indicated she is a member of.

The other thing that is bothersome to this Court is that this individual has indicated that since she has been a teen that she has been, in fact, a Christian. Yet all we get is a letter indicating that she is part of a prayer group. She indicated that she went to

church, that she took her children to church. It would be very easy to get a letter from that particular church indicating that, in fact, she is or was a member of that church for sometime, that her children were members of that church. I have a sneaking suspicion that this woman is now a Christian, but was not prior to this particular time. The Court had some real questions about it. And the reason the Court also had questions is, as the attorney for the Service, the Court went looking at the identification card, did, in fact, notice that the identification card did, in fact, have different lettering involving the religion and the Court noticed that also.

The other thing the Court noticed is that this individual is of Chinese ancestry. She gets her passport in Singapore. If she was having that much problems with the religion in Indonesia, she would have easily qualified to stay, I believe, in China as being a descendant from Chinese ancestry.

The other issue that the Court has at this particular time is that her mother has been a Christian for sometime. She said her grandmother has been a Christian for sometime, yet this woman comes to the United States, she stays here. She goes back to Indonesia. Whether she's old or not, I don't think that fundamentalist Islamic individuals care whether she's old or not. She's Christian. She's fare game. But she went back and she's there at this time. She also has other family members that are there and have remained there for quite sometime.

The Court would indicate that in *A-E-M*, decided February 20, 1998, Int. Dec. 3338, that states a reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after their departure. She has been gone for two years and the family is still there and they are doing fine. She says that her mother is fearful but she comes to the United States and she goes back so I don't know how fearful she is.

The Court would state that the Court in this particular matter felt that this particular testimony wasn't reliable, wasn't truthful, that after a careful review of the record, the Court finds that the respondent's testimony was not sufficiently detailed, consistent or believable to provide a coherent account of the basis for her fears and, thus, cannot suffice to establish eligibility without further corroborating evidence.

The Court would indicate that the Court was very close at this particular time to indicate that this was, in fact, a frivolous application for asylum.

In the *Matter of Acosta* which was decided by the BIA in 1985, a 19 I&N Dec. 211, there must be a showing that the threat of persecution for him or her exists countrywide. In this particular matter, the respondent did, in fact, reside in Jakarta which is the biggest city in Indonesia. It's my understanding from reading the State Department report that the fundamental Islamic movement is more prevalent in the

countryside, that, in fact, in Indonesia in the bigger cities, that there are problems with Christians and Moslems, but not like they have in the rural settings where they burn the churches and so forth, even though they have done so in Jakarta, that a person is a lot safer there.

And what bothers this Court is that she has been a Christian since she was young girl. She never had any confrontations. She says people have called her and told her not to go to church, but, you know, it's amazing that even in 1998 when the riots were happening that this individual was never confronted or never hurt in any way nor was her husband. So, the Court believes that this individual's credibility is not very good at this time and is not believable.

The Court would also indicate that in this particular matter, the Court is aware that President Megwadi has, in fact, engaged the United States in asking the United States to help clear that country of fundamental Islamic terrorists so the country could go forward. It seems to me that, in fact, she is going in the right direction and the Court does not believe that these people would be in any harm if, in fact, returned to Indonesia.

Inasmuch as the respondents have failed to satisfy the lower burden of proof required for asylum, it follows that they have also failed to satisfy the clear probability standard of eligibility required for withholding of removability. The evidence does not establish that if they were now to return to Indonesia that

it is more likely than not that they would be subject to persecution on account of one of the five grounds specified in Section 241(b)(3) of the Act.

The Court would indicate that under Section 8 C.F.R, sub-Section 208.13, withholding of removability under the Torture Convention Act that there is no filing deadline, that there must be a showing of a fear of torture. She says she is afraid to go back. For such purposes as obtaining information or confession, punishment for an act committed, suspected intimation or coercion or discrimination, there must be a present fear showing instigated by or with the consent or acquiescence of a public official or person acting in an official capacity. The burden of proof is more likely than not.

The Court would indicate that it is obvious that there has a change in country circumstances and that President Megwadi is doing her best or going in right direction to counter any religious bias, any ethnic bias and that she is going in that direction.

In light of the foregoing and after considering all of the testimony and documentary evidence of record, the following order shall be entered.

ORDER

WHEREFORE, IT IS ORDERED that the respondents' application for political asylum pursuant to Section 208 of the Act be denied.

WHEREFORE, IT IS ORDERED that the respondents' APPLICATION FOR withholding of removability pursuant to Section 241(b)(3) of the Act be denied.

WHEREFORE, IT IS ORDERED that the respondents' application for withholding of removability pursuant to the Torture Convention Act, 8 C.F.R. sub-section 208.13 be denied.

WHEREFORE, IT IS ORDERED that in lieu of removability, the respondents shall be granted voluntary departure without expense to the Government for a period of 30 days until June 28, 2002, or extension beyond such date as may be granted by the District Director and such conditions as the District Director shall direct.

WHEREFORE, IT IS FURTHER ORDERED that if the respondents fail to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice and that proceedings and the following order shall thereupon become immediately effective: Respondents shall be removed from the United States to Indonesia on the charge contained in the Notice to Appear in removal proceedings.

The Court would also indicate that the respondents must, in fact, post a departure bond for each individual in this matter of $500. That bond must be posted with the Immigration authorities within five working days from today.

The Court will also indicate at this time that the Court will, in fact, reserve Mr. Hyde's client's right to appeal, that that appeal is due on June 28, 2002, before the Board of Immigration Appeals.

/s/ _____
DAVID J. CORDOVA,
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A79-468-924 – DENVER Date: MAY 13 2004

In re: ESTALITA, INDAH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Hyde, Patrick C., Esq.

ON BEHALF
OF DHS: Eileen R. Trujillo, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so

depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ Roger A. Paul
FOR THE BOARD

2004 WL 2374716 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE:
INDAH

ESTALITA

File: A79 468 924 – Denver

August 5, 2004

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:

Martha L. Hyde, Esquire

In dismissing the respondent's appeal in our May 13, 2004, order, we afforded her a period of 30 days for voluntary departure. That period was extended until July 12, 2004, by the acting district director. On July 7, 2004, the respondent filed a motion to reopen. The motion, which is not opposed by the Department of Homeland Security, will be granted.

According to evidence submitted with the motion, the Department of Labor has approved an application for employment certification in the respondent's behalf. A visa petition for an alien worker visa has reportedly been filed and is pending.

Given the Department's non-opposition, and the respondent's apparent colorable eligibility for adjustment of status, we will grant the motion and remand the case to afford the respondent the opportunity to pursue an application for adjustment of status. It will be the respondent's burden to demonstrate both eligibility and worthiness for the discretionary relief of adjustment, and we intimate no opinion as to the ultimate resolution in this matter. Should the respondent be notified that her removal is imminent, she may file a motion to stay removal; given her present circumstances, however, the prospects for her removal at this point are remote, and a stay of removal is consequently not considered necessary.

ORDER: The motion is granted, and the record is remanded to the Immigration Court for proceedings consistent with the foregoing opinion.

<Signature>

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 Stout Street, Room 1402
Denver, Colorado

IN THE MATTER OF: Case Nos.: **A 79-468-924**
A 79-468-921
Indah ESTALITA **A 79-468-922**
Donni RADITE **A 79-468-923**
Leticya MIRANDINI
Yudikari ANGGRAITO

RESPONDENTS

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration of the Motion to Terminate and to Vacate the November 16, 2005 Hearing filed in the entitled matter, and having been satisfied that the non-moving party was accorded notice and an opportunity to respond, it is HEREBY ORDERED that these proceedings be terminated for lack of jurisdiction.

Reason for Termination:

All residents departed the United States on July 12, 2004 under grants of voluntary departure and while their motions to reopen were pending before the Board of Immigration Appeals. The departures withdrew the motions pursuant to 8 C.F.R. § 1003.2(d) (2005). *See Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001)

IT IS FURTHER ORDERED that the hearing currently set for November 16, 2005 be vacated.

/s/ David J. Cordova
DAVID J. CORDOVA
Immigration Judge
Date: Nov. 1, 2005

Appeal: waived – reserved
Appeal Due Date: _____

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A79 468 924 – Denver
A79 468 921
A79 468 922
A79 468 923

Date: JUN 20 2007

In re: INDAH *ESTRALITA*
DONNI *RADITE*
LETICYA *MIRANDINI*
YUDIKARI *ANGGRAITO*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Patrick C. Hyde, Esquire

ON BEHALF OF DHS: Lillian Alves
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] –
In the United States in violation of law (all respondents)

APPLICATION: Termination

The respondents appeal the Immigration Judge's decision dated November 1, 2005. The lead respondent contends that the Immigration Judge erred in granting the Department of Homeland Security's

("DHS") motion to terminate proceedings for lack of jurisdiction. The lead respondent concedes that she filed a motion to reopen with this Board and then departed the United States pursuant to an order of voluntary departure. She concedes that her departure occurred before our August 5, 2004, order granting her motion to reopen. Any departure from the United States occurring after the filing of a motion to reopen constitutes a withdrawal of such motion. 8 C.F.R. § 1003.2(d). We were not aware of the lead respondent's departure when we issued our August 5, 2004, order. Had that information been available, we would not have reopened proceedings inasmuch as we would have lacked jurisdiction to do so.

The lead respondent contends that *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005), gives the Immigration Judge jurisdiction over her case. However, the cited case does not include a finding regarding aliens, such as the lead respondent, who have already departed the United States. *See generally Azarte v. Ashcroft*, *supra* (finding that in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal is requested, the voluntary departure period is tolled during the period the Board is considering the motion). The lead respondent has not cited any case law requiring or permitting cognizance over a motion to reopen where an alien departed pursuant to a voluntary departure order and then returned to the United States.

The lead respondent also contends that the Immigration Judge did not give her adequate time to

respond to the DHS's motion to terminate. The DHS filed a motion to terminate on October 24, 2005, and the Immigration Judge issued his decision on November 1, 2005, The DHS filed a brief on appeal and does not oppose remanding the record to the Immigration Judge based on his failure to give the lead respondent sufficient time to respond to the motion to terminate. However, we will not remand the record to the Immigration Judge because the respondent has not established that she was prejudiced by the failure to give her more time to respond. The lead respondent has not shown on appeal a likelihood that she would have prevailed on the jurisdictional issue before the Immigration Judge. Accordingly, we vacate our August 5, 2004, decision and dismiss the respondents' appeal of the Immigration Judge's November 1, 2005. decision. *See Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001) (when the Board is presented with evidence that it has granted a motion to reopen after the alien's departure from the United States, it is appropriate to reconsider and vacate the prior order on jurisdictional grounds).

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The Board's August 5, 2004, decision is vacated.

/s/ Roger A. Paul
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 07-9553

ORDER

(Filed Jul. 27, 2010)

Before **TACHA**, **EBEL**, and **HARTZ**, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

No. 10-517

In the Supreme Court of the United States

INDAH ESTALITA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 8 C.F.R. 1003.2(d), which precludes the Board of Immigration Appeals from granting a motion to reopen filed by an alien who has departed the United States, is valid as applied to a timely motion to reopen.

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In the Supreme Court of the United States

No. 10-517

INDAH ESTALITA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the *Federal Reporter* but is reprinted at 382 Fed. Appx. 711. The opinions of the Board of Immigration Appeals (Pet. App. 23-24, 25-26, 29-32) and the immigration judge (Pet. App. 7-22, 27-28) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-6) was entered on June 11, 2010. A petition for rehearing was denied on July 27, 2010 (Pet. App. 33). The petition for a writ of certiorari was filed on October 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), .23(b)(1) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted," and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), .23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), .23(b)(1). Those limitations do not apply, however, if the basis of the motion is to apply for asylum or withholding of removal and the motion is based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered" since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), .23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the

Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

2. Longstanding regulations of the Attorney General bar aliens who have departed the United States from obtaining reopening of their immigration cases.

a. The Attorney General has provided for discretionary reopening of immigration proceedings by regulation since 1941. See 6 Fed. Reg. 71-72 (1941). In 1952, the Attorney General amended his regulations to bar immigration officials from granting a motion to reopen filed by an alien who has departed the United States. 17 Fed. Reg. 11,475 (1952) (8 C.F.R. 6.2 (1952)); see *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 648-649 (B.I.A. 2008). That bar has remained substantially the same since 1952. In its current form, the regulation addressing reopening motions before the Board provides:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. 1003.2(d). Another regulation, 8 C.F.R. 1003.23(b)(1), places the same restrictions on reopening before an IJ.

b. Prior to 1996, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not address whether an alien could file a motion to reopen. In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their time in the United States, see *Dada* v. *Mukasey*, 554 U.S. 1, 13 (2008), and it therefore directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and to specify the time period for the filing of such motions. Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066.

The Attorney General promulgated the final regulations in April 1996. Those regulations included time and numerical limits on motions to reopen, and also reaffirmed the longstanding bar on granting motions to reopen filed by aliens who have departed the United States. 61 Fed. Reg. 18,905 (1996) (8 C.F.R. 3.2(c)(2) (1997)).

c. In September 1996, Congress amended the INA to codify procedures for filing motions to reopen. Congress provided that an alien "may file one motion to reopen" and codified the time and numerical limitations contained in the regulation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (8 U.S.C. 1229a(c)(7)). Congress also repealed a longstanding statutory provision that precluded judicial review of removal orders if the alien had departed the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Congress did not, however, overturn the longstanding regulation containing the bar to reopening for an alien who has departed the United States.

d. The Attorney General then promulgated regulations implementing IIRIRA, which retained the long-standing departure bar. 62 Fed. Reg. 10,321 (1997). The Attorney General explained that "[n]o provision of the new section [on judicial review in IIRIRA] supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." *Ibid.* In the Attorney General's view, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages [a] system [permitting immigration officials to grant such motions] might render." *Ibid.*

3. Section 245(a) of the INA, 8 U.S.C. 1255(a), provides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisites must be met. The alien must "make[] an application for such adjustment"; be "eligible to receive an immigrant visa" and be "admissible to the United States for permanent residence"; and must have an "immigrant visa * * * immediately available to [her] at the time [her] application is filed." *Ibid.*

If the alien seeks to adjust status on the basis of employment, she must go through a multi-step process. First, her employer must obtain a certification from the Department of Labor (DOL) (through Form ETA-750) that "there are not sufficient workers who are able, willing, qualified * * * and available at the time of application" to perform the job the alien seeks to perform in the United States, and that "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly em-

ployed." 8 U.S.C. 1182(a)(5)(A)(i). Second, the employer must obtain approval from United States Citizenship and Immigration Services (USCIS) of an Immigrant Petition for Alien Worker (Form I-140) indicating that the alien possesses the required education and experience for the job. 8 C.F.R. 204.5. When the alien's priority date (the date DOL accepted the labor certification for processing) becomes current, the alien may submit an application to adjust her status to that of a lawful permanent resident.

Even if all of the statutory prerequisites are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in [her] favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980).

4. Petitioner is a native and citizen of Indonesia. Pet. App. 2. She entered the United States as a nonimmigrant visitor in October 2000 and remained beyond the time permitted. *Id.* at 2, 7.

In April 2001, petitioner filed an application for asylum. Administrative Record (A.R.) 645. The Department of Homeland Security (DHS) referred her asylum application to an IJ and charged petitioner with being removable as an alien who remained in the United States beyond the time permitted. Pet. App. 2-3; A.R. 643; see 8 U.S.C. 1252(a)(1)(B). Petitioner conceded that she is removable as charged but renewed her application for asylum and sought withholding of removal, protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85,

and voluntary departure under 8 U.S.C. 1229c. Pet. App. 3, 20-21.

The IJ found petitioner removable as charged, denied her applications for asylum, withholding of removal, and CAT protection, and granted her request for voluntary departure. Pet. App. 7-22. Petitioner contended that she would be persecuted or tortured if returned to Indonesia because she is Christian and of Chinese ancestry. *Id.* at 12-15. The IJ found that petitioner's testimony "wasn't reliable"; "wasn't truthful"; and "was not sufficiently detailed, consistent or believable to provide a coherent account of the basis for her fears." *Id.* at 18. Indeed, the IJ found that petitioner's asylum application was "very close to * * * frivolous." *Ibid.*

The IJ noted that although petitioner claimed to be a Christian her entire life, there was little documentation of that fact (only a letter from a church she attended in the United States). Pet. App. 16-17; A.R. 532 (letter). The IJ also observed that petitioner "was never confronted or never hurt in any way" as a result of her religion or ancestry. Pet. App. 19. Although the IJ found that petitioner failed to establish past persecution, he also determined that even if petitioner had made such a showing, "there has been a change in country circumstances" because the new President of Indonesia has "declared * * * that all religions should be tolerated" and has worked to improve relations between Muslims and Christians. *Id.* at 16, 19.

The IJ then granted petitioner's request for voluntary departure under 8 U.S.C. 1229c. Pet. App. 21; see *Dada*, 554 U.S. at 9-11 (discussing voluntary departure). "Voluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement"; "[i]n return for anticipated benefits, including the possibility of

readmission, an alien who requests voluntary departure represents that he or she has the means to depart the United States and intends to do so promptly." *Dada*, 554 U.S. at 19 (internal quotation marks omitted). The IJ explained that under the grant of voluntary departure, petitioner was required to leave the United States within 30 days. Pet. App. 21.

5. The Board affirmed the IJ's decision without issuing a separate opinion. Pet. App. 23-24. The Board stated that petitioner was required to voluntarily depart the United States by June 12, 2004. *Id.* at 3, 23-24. DHS later extended that date to July 12, 2004. *Id.* at 3, 25; A.R. 196; see 8 C.F.R. 1240.26(f).

6. Five days before her scheduled departure deadline, petitioner filed a motion to reopen her case. She sought to adjust her status to that of a lawful permanent resident based on employment. A.R. 189-191. She contended that her employer recently had obtained an approved labor certification on her behalf, her I-140 visa petition was *prima facie* approvable, and the priority date was current. Pet. App. 3, 25; A.R. 189-191. Petitioner did not, however, seek to withdraw her request for voluntary departure. Cf. *Dada*, 554 U.S. at 6, 21-22. Instead petitioner departed, in accordance with her agreement under her voluntary departure order, on July 12, 2004. Pet. App. 3-4. Unaware of that fact, the Board granted the motion to reopen and remanded the proceedings to the IJ. *Id.* at 25-26.

7. DHS reports that on August 10, 2004—five days after the Board's decision granting her motion to reopen—petitioner attempted to re-enter the United States. She lacked a visa or any other valid document necessary for entry. Petitioner and her husband claimed, in sworn statements, that they were "legal resi-

dents" of the United States. A.R. 70. Because petitioner expressed fear of returning to Indonesia, A.R. 65-71, she received a credible fear interview and was paroled into the United States and charged with being removable as an "arriving alien," A.R. 54; 8 U.S.C. 1225(b)(1)(A)(i); 8 C.F.R. 1001.1(q). See also Pet. 11 (acknowledging this chain of events).

8. DHS then filed with the IJ a motion to terminate proceedings for lack of jurisdiction. Pet. App. 4; A.R. 52-57. The motion asserted that the Board could not grant petitioner reopening because she departed the United States while her motion to reopen was pending. A.R. 55 (relying on *In re Crammond*, 23 I. & N. Dec. 179, 180 (B.I.A. 2001) (holding that when the Board is presented with evidence that it has granted a motion to reopen after the alien's departure from the United States, it is appropriate to reconsider and vacate the prior order)).

The IJ granted the motion to terminate, stating that petitioner's departure withdrew her motion to reopen under 8 C.F.R. 1003.2(d). Pet. App. 27-28.

9. The Board dismissed petitioner's appeal. Pet. App. 29-31. The Board explained that petitioner's departure while her motion to reopen was pending "constitute[d] a withdrawal of such motion" under 8 C.F.R. 1003.2(d). Pet. App. 30. The Board stated that it had not been aware of petitioner's departure at the time of its prior decision and "[h]ad that information been available, [it] would not have reopened proceedings." *Ibid.*

10. The court of appeals denied the petition for review in an unpublished, non-precedential opinion. Pet. App. 1-6. Petitioner contended that the departure bar in 8 C.F.R. 1003.2 was invalid because it conflicted with the provision of the INA that authorizes aliens to file

one motion to reopen, 8 U.S.C. 1229a(c)(7)(A). Pet. Supp. C.A. Br. 17-48.[1]

The court of appeals rejected that argument, relying on its recent decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), cert. denied, 131 S. Ct. 502 (2010). In *Rosillo-Puga*, the court applied the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and determined that the statute is "simply silent" on whether an alien who has departed the United States may obtain reopening of her removal order. *Rosillo-Puga*, 580 F.3d at 1156. The court explained that the relevant statutory text—which provides that "[t]he alien may file one motion to reconsider a [removal] decision," 8 U.S.C. 1229a(c)(6)(A), and that "[a]n alien may file one motion to reopen proceedings under this section," 8 U.S.C. 1229a(c)(7)(A)—does not evidence any clear intent about whether Congress "meant to repeal the post-departure bars contained in the Attorney General's regulations." 580 F.3d at 1156-1157. The court was "not persuaded * * * that, by negative inference, Congress intentionally swept away forty years of continuous practice by the Attorney General." *Id.* at 1157. Having "concluded that the statute is not clear and unambiguous," the court determined that the Attorney General's regulation represents a "permissible construction of the statute" at step two of the *Chevron* framework, because an alien's departure from the United States fundamentally changes her status under the law. *Id.* at 1157-1158 (internal quotation marks omitted).

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[1] Petitioner also contended that due process requires that she be allowed to file one timely motion to reopen. Pet. App. 4. The court of appeals rejected that argument, *id.* at 6, and petitioner does not renew it before this Court.

In this case, the court of appeals recounted its analysis in *Rosillo Puga* and then concluded that "the [Board] properly determined that [petitioner's] departure from the United States during the pendency of her motion to reopen constituted a withdrawal of her motion." Pet. App. 5-6.

11. Petitioner filed a petition for rehearing en banc, which was denied, with no member of the panel and no judge in regular active service requesting a poll. Pet. App. 33.

ARGUMENT

Petitioner contends (Pet. 25-29) that the bar to reopening contained in 8 C.F.R. 1003.2(d) is invalid because it conflicts with the statutory provisions governing motions to reopen. The decision below is correct, and it does not create binding circuit precedent and therefore cannot give rise to the type of disagreement in published circuit opinions that would warrant this Court's review. Although the court below relied upon its prior decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), cert. denied, 131 S. Ct. 502 (2010), that case was different because it addressed an untimely motion to reopen, and such untimely motions are not addressed in 8 U.S.C. 1229a(c)(7).[2] In any event, this case would be a poor vehicle for considering the question presented. Petitioner requested and was granted voluntary departure, and then filed a motion to reopen to obtain adjustment of status, a discretionary mechanism that is available only to an alien who is *within* the United States. It

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[2] This Court recently denied certiorari petitions challenging the departure bar regulation in the context of untimely motions to reopen. See *Rosillo-Puga*, 131 S. Ct. at 502 (No. 09-1367); *Mendiola* v. *Holder*, 131 S. Ct. 502 (2010) (No. 09-1378).

therefore is especially reasonable to provide that reopening will not be granted to an alien to allow her to pursue adjustment of status if she has voluntarily departed the United States, and that departure therefore will be regarded as a withdrawal of the motion to reopen. Moreover, petitioner cannot obtain adjustment of status in this proceeding due to her departure from the United States and return as an arriving alien. Further review is therefore unwarranted.

1. The court of appeals' decision is correct. As the court below understood, Pet. App. 5, whether the regulation at issue is valid depends upon application of the *Chevron* framework. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Here, although the statute prescribes time and numerical limitations for motions to reopen, it says nothing about whether an alien may obtain reopening after she has departed the United States.

a. The INA provides that "[a]n alien may file one motion to reopen proceedings under this section" and requires that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i). These provisions do not by their terms address whether immigration officials may grant motions to reopen or reconsider filed by aliens who have departed the United States. See *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441 (1st Cir. 2007) ("no statutory language * * * explicitly addresses the issue"), cert. denied, 129 S. Ct. 37 (2008). The court below found that omission particularly telling, because the Attorney General's regulations have for decades specifically precluded immigration officials from granting motions to reopen or reconsider filed by aliens who have left the United States. Pet. App. 5.

Indeed, when Congress codified the time and numerical limitations on motions to reopen and reconsider in 1996, it left the departure bar unchanged in the regulations. See p. 4, *supra*. As the court of appeals recognized (Pet. App. 5), Congress's failure to take any steps to change or override the departure bar strongly suggests that it did not intend to disturb the agency's longstanding practice. See, *e.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [relevant] change."). Accordingly, there is no conflict between the statutory language providing for motions to reopen and the departure bar contained in the regulations.

Petitioner does not contend that Section 1229a(c)(7) expressly addresses the situation of an alien who has filed a motion to reopen and then left the United States. Instead, she suggests (Pet. 26-27) that Section 1229a provides "exceptions" and that "no others" may be included. The provisions petitioner cites are not "exceptions"; they are minimum requirements for filing a motion to reopen—*i.e.*, that (subject to limited exceptions) the alien may file only one motion and must do so within 90 days. The statute does not say that all motions to reopen that meet those requirements set out in the statute must be granted, and it has long been settled that that is not the case. To the contrary, the decision whether to grant reopening has always been discretionary with the Attorney General, and the regulation petitioner challenges reflects a longstanding exercise of that discretion by making reopening unavailable to an alien who has left the country. Moreover, the statutory provi-

sions petitioner cites are prerequisites that Congress borrowed from the existing regulations when codifying provisions for motions to reopen. As explained above (see pp. 12-13, *supra*), it is significant that when Congress codified those provisions, it did not make any change to the longstanding departure bar.

Petitioner is also wrong to rely (Pet. 27) on the provision addressing victims of domestic violence, 8 U.S.C. 1229a(c)(7)(C)(iv)(IV). That provision creates an exception to the usual 90-day time limit for filing a motion to reopen for a victim "physically present in the United States at the time of filing the motion." *Ibid.* That provision would preclude the Attorney General from allowing such a victim to file a motion for reopening after 90 days if she left the country. It does not suggest that the Attorney General may not as a discretionary matter provide that other aliens who have left the country will also be denied reopening.

Finally, petitioner contends (Pet. 28-29) that IIRIRA's repeal of the bar to *judicial* review for aliens who have left the United States means Congress intended the same result for motions to reopen. Like petitioner's other arguments, any such inference cannot make the statutory text (which simply does not speak to the issue) unambiguously clear. In any event, Congress's repeal of the bar to judicial review does not aid petitioner, because at the same time Congress made that change, it chose not to repeal the longstanding departure bar regulation. See p. 4, *supra*. Congress had good reason to make that distinction: "A petition for review of a final order of removal represents an alien's first and only opportunity for judicial review of the merits of the order, whereas a motion to reopen seeks a *subsequent* opportunity for administrative review." *William* v. *Gon-*

zales, 499 F.3d 329, 343 (4th Cir. 2009) (Williams, C.J., dissenting) (emphasis in original).

b. After concluding that the INA does not speak directly to the question, the court of appeals correctly determined that the regulation is based on a permissible reading of the statute. Pet. App. 5; see *Rosillo-Puga*, 580 F.3d at 1157-1158. Petitioner does not challenge this aspect of the court of appeals' decision, instead making only a *Chevron* step one argument. See Pet. 25-26. In any event, Congress has expressly granted rulemaking authority to the Attorney General, see 8 U.S.C. 1103(g)(2), and the departure bar regulation therefore must be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984).

Here, the Attorney General reasonably decided to categorically limit immigration officials from exercising their discretion to grant reopening to aliens who have departed the United States. Departure is a "transformative event" that fundamentally changes the alien's status under the law. *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 655-656 (B.I.A. 2008). As the Attorney General explained in retaining the departure bar following the enactment of IIRIRA, once departure occurs, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render." 62 Fed. Reg. 10,321 (1997). That decision is reasonable in light of a central focus of Congress in IIRIRA, which was to place limits on aliens' ability to reopen and reconsider their cases and to expedite their removal from the United States. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. 1, at 360

(1996). That focus is reflected in Section 1229a itself, which imposes certain limits on the alien's ability to obtain reopening, but does not limit the discretion of the government with respect to such motions. Indeed, as this Court has noted, "protecting the Executive's discretion * * * can fairly be said to be the theme of [IIRIRA]." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). The repeated and longstanding determination by Attorneys General over many years to limit the discretion of immigration officials so that they may not grant motions to reopen filed by aliens who have departed the United States is reasonable. There is, accordingly, no basis for invalidating the longstanding regulations.

c. The application of the provision in the regulation that departure constitutes a withdrawal of the motion to reopen is particularly reasonable here, where the alien is seeking reopening to pursue an application for the new relief of adjustment of status. Petitioner requested and received the privilege of voluntary departure, and she did not withdraw that request when she filed her motion to reopen to seek adjustment, but instead departed according to the terms of that agreement.

"[A]djustment of status is merely a procedural mechanism by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (B.I.A. 1992). Before Congress created the mechanism of adjustment of status, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already in the United States is treated as if she were seeking admission from

abroad but is permitted to remain here while the application is pending. See *ibid.*; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S-*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

Adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. Because the adjustment-of-status procedure ultimately affects the procedures by which, and the location from which, an alien may seek discretionary admission into the country—rather than her substantive entitlement to admission—it is particularly appropriate to provide that reopening will not be granted to an alien who has departed the United States to allow her to pursue adjustment of status, rather than applying for admission at a consulate abroad.

2. Petitioner contends (Pet. 14-23) that review is warranted because there is disagreement in the circuits regarding the question presented. There is no disagreement warranting review in this case.[3]

a. As an initial matter, the decision below is unpublished and does not create circuit precedent. See Pet. App. 2 n. *; see also 10th Cir. R. 32.1(A). Although the decision below relied on the court's prior decision in *Rosillo-Puga*, the issue addressed in that case was different, because it concerned an untimely motion to reopen. As the government explained in its brief in opposition to the certiorari petition in *Rosillo-Puga*, to the extent that 8 U.S.C. 1229a(c)(7) could be interpreted to afford an alien a right to file a motion to reopen even

[3] Contrary to petitioner's contention (Pet. 23), the government did not "acknowledge[] a circuit split concerning timely motions to reopen" in the briefs in opposition to certiorari in *Rosillo-Puga* and *Mendiola*.

post-departure, that could only be true with respect to motions that are filed within the time and numerical limitations contained in that statute. Br. in Opp. at 12-17, *Rosillo-Puga*, *supra*; see 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (providing that "[a]n alien may file one motion to reopen proceedings under this section" and that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal"). Although the court in this case applied *Rosillo-Puga* in the context of a timely motion to reopen, it did so in an unpublished, non-precedential opinion. Because there is no precedential decision in the Tenth Circuit addressing timely motions to reopen, there is no decision of that court that could give rise to a circuit conflict warranting this Court's review on the question whether Section 1229a(c)(7) invalidates the departure bar in the context of a timely motion to reopen.

b. The Fourth Circuit is the only circuit to have invalidated the departure bar regulations as conflicting with the statutory text, and no circuit has expressly rejected such a challenge in a published decision in the context of a timely motion to reopen.

The Fourth Circuit held in *William* v. *Gonzales*, *supra*, that the statement in Section 1229a(c)(7) that an alien "may file" one motion to reopen within the specified time limits "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country," and therefore conflicts with the departure bar regulations. 499 F.3d at 332. *William* is distinguishable from this case on several grounds. The alien in *William* was removed involuntarily from the United States, *id.* at 331, while petitioner chose voluntary departure, "an agreed-upon exchange of benefits" (*Dada*, 554 U.S. at 19) where

petitioner made certain concessions in order to arrange her own affairs before departure and remain eligible for future benefits, such as readmission, while the United States obtained in return her agreement to prompt departure. Further, the alien in *William* was seeking to reopen his proceedings based on new evidence that he contended called into question whether he was removable at all, 499 F.3d at 331, while petitioner here sought reopening to seek a new form of relief through a procedural mechanism available only to aliens in the United States, see pp. 16-17, *supra*. And unlike the alien in *Dada*, she did not seek to withdraw her request for voluntary departure when she filed her motion to reopen. Cf. *Dada*, 554 U.S. at 6, 19-21. Having requested and obtained voluntary departure and chosen to follow through with her commitment to depart, it is entirely reasonable to treat petitioner's voluntary departure as a withdrawal of her motion to obtain relief that would have been available only if she had remained in the United States. The circumstances of this case are thus quite different from *William*.

The Fourth Circuit is, moreover, the only court of appeals that has invalidated the regulation at issue on the ground that it conflicts with the statute. In *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-595 (2010), the Seventh Circuit determined that the departure bar in 8 C.F.R. 1003.2 should not be interpreted to limit the Board's jurisdiction to consider such motions, but may instead operate to bar the Board from granting such motions. But the court did not hold that a bar to reopening for an alien who is no longer in the United States is invalid; instead, it noted that the Board "may well be entitled to recast its approach" as a claim-processing rule rather than one of "subject-matter jurisdiction."

See *id.* at 595; see generally *Union Pacific R.R. Co.* v. *Brotherhood of Locomotive Engr's*, 130 S. Ct. 584, 596 (2009) (explaining that in contrast to a jurisdictional rule, "a claim-processing rule even if unalterable on a party's application does not reduce the adjudicatory domain of a tribunal" (internal quotation marks omitted)). Indeed, *Marin-Rodriguez* expressly rejected the reasoning in *William*. 612 F.3d at 592-593.

In *Coyt* v. *Holder*, 593 F.3d 902, 907 (2010), the Ninth Circuit held that 8 C.F.R. 1003.2(d) does not apply to "withdrawal of a[] [motion to reopen] filed by a petitioner who has been involuntarily removed from the United States." That decision considered a different argument than petitioner makes here. The Ninth Circuit found 8 C.F.R. 1003.2(d) "invalid as applied to a forcibly removed petitioner," meaning an alien who was physically deported by the government. *Coyt*, 593 F.3d at 907-908. The court stated that it "need not, and d[id] not, reach" any question whether the departure bar could be applied to a "voluntary" departure. *Id.* at 907 n.3. Here, petitioner voluntarily departed the United States, and *Coyt* by its terms would not apply to her case.[4]

In *Madrigal* v. *Holder*, 572 F.3d 239 (2009), the Sixth Circuit addressed a different regulation, 8 C.F.R.

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[4] The Ninth Circuit has interpreted the departure bar regulation so as not to apply to aliens whose removal proceedings have been completed. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007). The *Lin* court reasoned that, because the regulation is phrased in the present tense, it applies only to aliens in removal proceedings, and not to those whose proceedings have been completed. *Lin* did not address whether the regulation is consistent with the INA, and it is therefore inapposite here.

Petitioner also cites (Pet. 20) *Aguilera-Ruiz* v. *Ashcroft*, 348 F.3d 835, 837 (9th Cir. 2003), but that case considered 8 C.F.R. 1003.4, which was not considered by the courts in this case.

1003.4, which provides that an alien's departure from the United States constitutes a withdrawal of a previously-filed appeal before the Board. The court held that the departure bar in that regulation did not withdraw the alien's administrative appeal which remained pending when the alien was physically removed by the government. 572 F.3d at 242-243. Because 8 U.S.C. 1003.4 addresses administrative appeals, not motions to reopen, *Madrigal* is inapposite here; neither the Board nor the court of appeals relied on (or even cited) it.[5]

c. Accordingly, the only court to invalidate the departure bar as inconsistent with Section 1229a(c)(7) is the Fourth Circuit. There is no decision from another court of appeals that conflicts with that decision. The decision below does not create circuit precedent, and in *Rosillo-Puga*, the Tenth Circuit specifically "distinguishe[d] th[at] case from * * * *William*" on the ground that *Rosillo-Puga* concerned only an untimely motion to reopen. 580 F.3d at 1158.[6]

Moreover, petitioner's citation (Pet. 17) of *Pena-Muriel* v. *Gonzales*, *supra*, is inapposite, because there the First Circuit upheld the departure bar against a different challenge than the one petitioner makes here. In that case, the court rejected the argument that Congress's repeal of 8 U.S.C. 1105a(c) (1994), which pre-

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[5] Petitioner cites (Pet. 20) two other decisions of the Sixth Circuit. The first, *Ablahad* v. *Gonzales*, 217 Fed. Appx. 470 (2007) (unpublished), does not create circuit precedent. The second, *Mansour* v. *Gonzales*, 470 F.3d 1194 (2006), applied 8 C.F.R. 1003.2(d), but it did not consider the argument that that regulation conflicts with the statutory provisions governing reopening. 470 F.3d at 1198.

[6] It appears that the motion in *William* may well have been untimely, 499 F.3d at 331, but the court of appeals did not address whether the motion was timely or consider timeliness in its analysis.

cluded judicial review of removal orders for aliens who had departed the United States, abrogated the Attorney General's authority to enforce the departure bar. *Pena-Muriel*, 489 F.3d at 441. That is different from the argument here, where petitioner contends that the departure bar regulation conflicts with Section 1229a(c)(7)(A). And in any event, the First Circuit's conclusion is consistent with the conclusion reached by the court below.

Finally, petitioner cites (Pet. 18 n.4) a number of decisions that apply the departure bar, but those decisions do not address whether the regulation is consistent with the statute, and they therefore cannot create a circuit split on that issue. The decision below therefore does not create or contribute to any disagreement in the circuits on the question presented.

3. In any event, this case would be a poor vehicle to consider the question presented. Regardless of how this Court resolved the question presented, petitioner cannot obtain reopening. She is now ineligible to have her case reopened because her status as an arriving alien means the IJ cannot grant her adjustment of status, which is the relief she seeks through reopening. See *In re Yauri*, 25 I. & N. Dec. 103, 109 (B.I.A. 2009) ("[W]e have not been granted authority to reopen the proceedings of respondents who are under a final administrative order of removal to pursue matters that could affect their removability if we have no jurisdiction over such matters.").

When petitioner attempted to re-enter the United States in August 2004, she had no valid documents and was paroled into the United States as an "arriving alien." See A.R. 54; 8 U.S.C. 1225(b)(1)(A); see also 8 C.F.R. 1.1001(q) (defining "arriving alien" as "an applicant for admission coming or attempting to come into

the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport"). "An arriving alien remains an arriving alien even if paroled" into the United States. 8 C.F.R. 1.1001(q). Petitioner therefore was and still is an arriving alien.

Under regulations applicable to all cases pending administrative or judicial review on or after May 12, 2006, and subject to limited exceptions not applicable here, for "an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien." 8 C.F.R. 1245.2(a)(1)(ii). Instead, only USCIS has jurisdiction over such an alien's application for adjustment of status. 8 C.F.R. 245.2(a)(1); see 71 Fed. Reg. 27,585 (2006). Accordingly, the IJ would not be able to adjudicate petitioner's application for adjustment of status even if reopening were available to her. Instead, petitioner could only obtain such adjudication from USCIS.[7] For that reason as well, further review is unwarranted.

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[7] Petitioner filed a Form I-140 petition and an application for adjustment of status with USCIS on June 27, 2004. A.R. 190. When she voluntarily departed the United States, her departure was deemed abandonment of, and caused termination of, that adjustment application. 8 C.F.R. 245.2(a)(4)(ii)(A). Her departure did not abandon the Form I-140 petition, however, nor does it preclude her from filing a new application for adjustment of status with USCIS. Petitioner is precluded by regulation, however, from obtaining adjustment of status through the immigration courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF

The government's brief underscores the need for this Court's review. It does not dispute that the issue presented is important and recurring. Nor does it dispute that Estalita remains eligible to adjust status. Opp. 23 n.7.

Rather, the government asserts that, because the decision below is unpublished, it cannot create a circuit conflict. It spends the bulk of its argument contesting the merits. Finally, it alleges vehicle issues based on events that occurred outside the record and after the decision below.

None of these arguments holds water. This Court frequently reviews unpublished decisions. It often does so where, as here, there is an established circuit conflict and where the court of appeals declared prior published circuit precedent to be binding. The entrenched 2-2-2 circuit split on this issue is recognized by the courts of appeals themselves. The government's disagreement about the merits is a very live dispute that only this Court can resolve. This Court questioned the post-departure bar but expressly left the issue open in *Dada* v. *Mukasey*, 554 U.S. 1, 18-19, 22 (2008). Finally, the vehicle objection slights this Court's remedial authority and misstates the applicable regulatory framework. Further review is warranted.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE BIA MAY REFUSE TO CONSIDER THE MERITS OF A DEPARTED NONCITIZEN'S FIRST, TIMELY MOTION TO REOPEN OR RECONSIDER

A. This Court Routinely Reviews Unpublished Decisions Implicating Circuit Splits

The government erroneously asserts that because the decision below is unpublished, "there is no precedential decision in the Tenth Circuit addressing timely motions to reopen . . . that could give rise to a circuit conflict warranting this Court's review." Opp. 18. That claim is doubly mistaken.

First, it contradicts the government's recent reading of the Tenth Circuit's precedent. Just three months ago, it acknowledged that a published Tenth Circuit decision had "state[d] its view that the [post-departure bar] would be valid even in the context of a timely motion to reopen." Opp. 21, *Rosillo-Puga* v. *Holder*, No. 09-1367, *cert. denied*, 131 S. Ct. 502 (2010) [*Rosillo-Puga* BIO].

Second, it misstates this Court's practice. "[This] Court grants certiorari to review unpublished and summary decisions with some frequency." Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007) (collecting citations). In fact, sometimes this Court "view[s] an unpublished or summary decision on a subject over which the courts of appeals have split as signaling a persistent conflict." *Id.*

Non-publication might be relevant only if "the court that rendered the decision may reach a different conclusion in the next case presenting the issue." *Id.* at 506. That is simply not true here. The Tenth Circuit did not view *Rosillo-Puga* as limited to untimely motions. Rather, it expressly held that it was binding precedent in this case, involving a timely motion: "But while the facts in this case may be more sympathetic, *Rosillo-Puga* upheld the very regulation at issue in this case and we are bound by precedent." Pet. App. 6; *see also Contreras-Bocanegra* v. *Holder*, No. 10-9500, 2010 WL 5209228, at *2-*3 (10th Cir. Dec. 23, 2010) (published decision upholding 8 C.F.R. §1003.2(d) and holding "that the timeliness of an alien's motion to reopen is irrelevant to the specific application of the post-departure bar" under *Rosillo-Puga*, and rejecting *Union Pacific* challenge to deference to agency's constriction of its jurisdiction). The Tenth Circuit here presumably did not publish its opinion because it had reached the same holding and denied rehearing en banc twice before. Its position is clear and firmly entrenched.

B. Four Other Circuits' Decisions Conflict with Those of the First and Tenth Circuits and Would Require the BIA to Consider Petitioner's Motion to Reopen

If Estalita's case had arisen in the Fourth or Seventh Circuits, her challenge to the post-departure bar would have succeeded. The same would have been true in the Sixth and Ninth Circuits because she had

been compelled to depart. Only the First Circuit would have joined the Tenth in denying her motion to reopen.

1. The Fourth and Seventh Circuits hold that §1003.2(d)'s post-departure bar cannot defeat the BIA's statutory jurisdiction to consider the merits of a departed noncitizen's motion to reopen. *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-94 (7th Cir. 2010) (Easterbrook, J.) ("[N]othing in [IIRIRA] undergirds a conclusion that the [BIA] lacks 'jurisdiction' – which is to say, adjudicatory competence – to issue decisions that affect the legal rights of departed aliens.") (citation omitted); *William* v. *Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) ("Congress did not make presence in the United States a prerequisite to filing a motion to reopen."). Here, the Tenth Circuit affirmed the BIA's conclusion that the IJ "lacked jurisdiction" to consider Estalita's motion to reopen. Pet. App. 30. The BIA's refusal to entertain her motion conflicts with *Marin-Rodriguez*'s and *William*'s holdings. If this case had arisen in the Fourth or Seventh Circuit, it would have come out differently.

The government mischaracterizes *Marin-Rodriguez*'s holding by quoting dictum suggesting that "the Board 'may well be entitled to recast its approach' as a claim-processing rule." Opp. 19 (quoting *Marin-Rodriguez*, 612 F.3d at 595). But just as it did here, the BIA in *Marin-Rodriguez* had dismissed the noncitizen's motion to reconsider on jurisdictional grounds. 612 F.3d at 592. Yet the Seventh Circuit granted the petition for review, instead of simply

remanding. *Id.* at 596. Since the BIA below has never "recast its approach," *Marin-Rodriguez*'s holding applies: the BIA cannot "forswear [its] subject-matter jurisdiction" and refuse to adjudicate a departed alien's motion. *Id.* at 595.[1]

The government's effort to distinguish *William* on its facts is also unavailing. Because *William* found that §1003.2(d) "lacks authority and is invalid," it struck down the regulation on its face. 499 F.3d at 334. Indeed, the Fourth Circuit later applied *William* for just that proposition, ignoring any factual differences. *Sadhvani* v. *Holder*, 596 F.3d 180, 183 (4th Cir. 2009) ("In *William I* we held that . . . 8 C.F.R. §1003.2(d), was invalid because it directly contradicted the statutory language in the INA which permitted one motion to reopen with no restriction on the location from which it was filed.").

Moreover, the BIA itself recognizes that *William* "constitutes binding precedent in removal proceedings arising within the jurisdiction of the Fourth Circuit." *Matter of Armendarez-Mendez*, 24 I.&N. Dec. 646, 655 n.7 (BIA 2008). Accordingly, within the Fourth Circuit the BIA no longer relies on the post-departure bar, even in voluntary-departure cases.

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[1] The Second Circuit reads *Marin-Rodriguez* as recognizing a statutory entitlement to have a motion to reopen considered on the merits. *Zhang* v. *Holder*, 617 F.3d 650, 664 (2d Cir. 2010) (noting *Marin-Rodriguez*'s holding that "the Attorney General, by promulgating §1003.2, has improperly 'contract[ed]' the jurisdiction given to the BIA by Congress pursuant to the IIRIRA").

See, e.g., *Matter of Veliz-Payes*, File: A070-569-618 – Baltimore, Md., 2008 WL 4222186 (BIA Aug. 29, 2008) (vacating IJ's dismissal for lack of jurisdiction of a voluntarily-departed noncitizen's motion to reopen).

2. Similarly, the Sixth or Ninth Circuit would have overturned the BIA's decision to dismiss Estalita's motion to reopen on jurisdictional grounds. Both circuits refuse to apply the post-departure bar to noncitizens like Estalita who are compelled to depart.

Thus, the Sixth Circuit held that applying the post-departure bar "regardless of the circumstances of [a noncitizen's] removal" would "perver[t] [] the administrative process." *Madrigal* v. *Holder*, 572 F.3d 239, 245 (6th Cir. 2009). Contrary to the government's intimation, even so-called "voluntary departures" occur in lieu of forcible removal and are not freely chosen, as *Madrigal* recognized. *Compare id.* at 244 n.4 *with* Opp. 8, 20.

The government tries to distinguish *Madrigal* as involving the post-departure bar governing BIA appeals, rather than the version at issue here governing motions to reopen. Both regulations, however, use the same phrase to implement the same rule, providing: "departure from the United States . . . shall constitute a withdrawal" of the pending motion or appeal, as the case may be. 8 C.F.R. §1003.2(d) (motions to reopen or reconsider), §1003.4 (appeals). The courts of appeals thus treat them as "equivalent regulations." *Marin-Rodriguez*, 612 F.3d at 594 (citing *Madrigal*); *see also Coyt* v. *Holder*, 593 F.3d 902, 907 (9th Cir. 2010)

(relying on *Madrigal*'s interpretation of §1003.4 in construing §1003.2(d)).

In the Ninth Circuit, a noncitizen compelled to depart the country may have her motion to reopen adjudicated on the merits if, as here, her removal proceedings have ended. *See Coyt*, 593 F.3d at 907; *Lin* v. *Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (holding that post-departure bar does not apply to noncitizens whose removal proceedings have been completed). The Ninth Circuit has never accepted the government's reading of *Coyt* as excluding departures that are "voluntary" in name only, where "the alien could [not] have remained to see the litigation through." *Marin-Rodriguez*, 612 F.3d at 594 (interpreting *Coyt* and *Madrigal*); Pet. 20. Estalita had to leave or she would have faced severe penalties and a conditional removal order the very next day. Her departure was "effectively coerced." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007) (holding threat of sanction was coercion, so capitulation to avoid sanction did not deprive federal court of declaratory-judgment jurisdiction); Pet. 21.

3. In contrast, the First Circuit, like the Tenth, would have upheld the dismissal of Estalita's motion. That court expressly upheld the "reasonableness of the Attorney General's interpretation of [IIRIRA] as [it] relate[s] to the reopening issue." *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 442 (1st Cir. 2007). Pena-Muriel argued that IIRIRA's repeal of the judicial post-departure bar implied a concomitant repeal of the administrative post-departure bar. Though the

government characterizes *Pena-Muriel* as raising a challenge "different from the argument here," Opp. 21-22, they are related theories in support of the same claim. *See, e.g.*, *Rosillo-Puga* v. *Holder*, 580 F.3d 1147, 1167 (10th Cir. 2009) (Lucero, J., dissenting) (advancing this precise theory as part of the same claim), *cert. denied*, 131 S. Ct. 502 (2010). Estalita advances the same argument and claim here. Pet. 28; Opp. 14.

Similarly, the decision below was dictated by *Rosillo-Puga*. There, the Tenth Circuit "uph[e]ld the [post-departure bar] regulations as valid under" IIRIRA. 580 F.3d at 1157. The panel below rejected Estalita's statutory challenge to the regulation because "*Rosillo-Puga* upheld the very regulation at issue and we are bound by precedent." Pet. App. 6. Three months ago, the government acknowledged that the Fourth and Tenth Circuits "disagre[e about] . . . whether the departure bar regulations are valid for timely motions to reopen." *Rosillo-Puga* BIO 21.

In sum, four circuits would have required the BIA to consider the merits of Estalita's motion, while two hold that §1003.2(d) validly deprives the BIA of jurisdiction once noncitizens have departed. This split is entrenched, acknowledged by four courts of appeals, and ripe for this Court's review. Pet. 21-23.

II. THE TENTH CIRCUIT ERRED IN UPHOLDING THE POST-DEPARTURE BAR

1. The government nowhere responds to Estalita's first argument that an agency may not constrict its congressionally conferred jurisdiction, and deserves no deference if it attempts to do so. Pet. 24-25.

2. The government conflates the BIA's mandatory jurisdiction to consider motions to reopen with its discretion to grant relief on the merits. No one disputes that IJs and the BIA exercise adjudicatory discretion on the merits and need not grant relief on all first, timely motions to reopen. Opp. 13. But here, the BIA had already exercised that discretion, granting the motion and remanding to let Estalita pursue adjustment of status. Pet. App. 26. It reversed itself later only because it erroneously concluded that it lacked jurisdiction even to hear the motion on the merits. Pet. App. 30. Since the BIA dismissed for that reason alone, the government cannot now switch arguments to claim that the BIA could have denied the requested relief on the merits. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Marin-Rodriguez*, 612 F.3d at 595. Indeed, the law-of-the-case doctrine may prevent the BIA from doing so now.

3. The statute's text, as well as its structure and enactment history, "guarantees to each alien the right to file 'one motion to reopen'" and have it considered on its merits. *Dada*, 554 U.S. at 15; Pet. 25-27. Though the government denigrates Estalita's seeking "new relief," Opp. 16, Congress authorized

these motions precisely to accommodate "'newly discovered evidence or a change in circumstances since the hearing.'" *Dada*, 554 U.S. at 12. While Congress codified the time, numerical, and new-evidence limits previously contained in regulations, it chose *not* to codify the post-departure bar. *See* Pet. 27; Opp. 4, 13-14. Since the administrative bar was never in the statute but was merely an administrative creation, Congress did not need to repeal it. Furthermore, if Congress expected the administrative post-departure bar to remain in effect, it would not have limited the domestic-violence provision to victims "physically present in the United States," as that bar would already have precluded such motions. 8 U.S.C. §1229a(c)(7)(C)(iv)(IV); Pet. 27; Opp. 14. The administrative post-departure bar, which Congress chose not to adopt, thus conflicts with IIRIRA by taking away a statutorily-mandated right.

III. THIS CASE IS AN IDEAL VEHICLE

The government claims that Estalita is now ineligible for reopening "because her status as an arriving alien means the IJ cannot grant her adjustment of status." Opp. 22; *see also id.* at 12. This argument is a red herring; the government conflates two separate times and statuses. Further, its claim slights this Court's remedial authority and misinterprets the arriving-alien regulation.

1. The government erroneously claims that, because Estalita became an "arriving alien" when she

returned to the country in August 2004, her reentry retroactively converted her into an arriving alien for purposes of her earlier petition and divested the IJ of jurisdiction. Opp. 22-23. The lack of IJ jurisdiction over a hypothetical *new* proceeding has no bearing on whether the IJ or BIA properly disclaimed jurisdiction over her *original* proceeding based on the post-departure bar.

The point of this Court's review would be to answer that question. If this Court agreed with Estalita on the merits, it would restore the status quo ante, returning Estalita to the IJ's jurisdiction to consider her motion on its merits. The government's contrary argument is especially troubling because it bases the IJ's lack of jurisdiction on her departure from this country, which was compelled by the government. *See Madrigal*, 572 F.3d at 245-46 (Kethledge, J., concurring); Pet. 30.

2. Moreover, 8 C.F.R. §1245.2(a)(1)(ii), on which the government relies, would not by its terms preclude an IJ from adjusting Estalita's status. The IJ in the original case would lack jurisdiction over any motions in new removal proceedings that might arise out of her August 2004 re-entry. But that is irrelevant to his jurisdiction to hear her July 2004 motion to reopen and adjust status as part of her original removal proceedings. Not only *can* the IJ adjudicate Estalita's application to adjust status, but *only* he can do so. The regulation states: "In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien),

the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate *any* application for adjustment of status the alien may file." 8 C.F.R. §1245.2(a)(1)(i) (emphasis added).

The government does not claim that Estalita was an "arriving alien" when DHS "charged [her] with being removable" in April 2001. Opp. 6. Rather, it claims that she entered as an "arriving alien" the second time, in August 2004, over three years after the removal proceedings began. *Id.* at 8-9. In 2001, she was not "placed . . . in removal proceedings . . . as an arriving alien." 8 C.F.R. §1245.2(a)(1)(i). Thus, the IJ who oversaw the removal proceedings has "exclusive jurisdiction to adjudicate any application for adjustment of status." *Id.*

The government incorrectly seeks to shoehorn Estalita into §1245.2(a)(1)(ii), which gives U.S. Citizenship and Immigration Services (USCIS) authority to adjudicate adjustment-of-status applications in entirely different circumstances.[2] According to the agencies that promulgated that provision, it applies to an "arriving alien who was paroled and *thereafter* placed in removal proceedings." Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for

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[2] The only case cited by the government is inapposite. In *Matter of Yauri*, the noncitizen conceded that she fell squarely within the scope of 8 C.F.R. §1245.2(a)(1)(ii) and that USCIS was thus responsible for adjudicating her application to adjust status. 25 I.&N. Dec. 103, 104 (2009).

Adjustment of Status, 71 Fed. Reg. 27,585, 27,588 (2006) (emphasis added). Estalita was placed in removal proceedings in 2001, long before she re-entered in August 2004 as a parolee. We cannot find in the record any notice of removal or notice to appear commencing new removal proceedings against her after August 2004, and the government does not claim otherwise. Thus, §1245.2(a)(1)(ii) does not apply, and the IJ retains jurisdiction.

The government's position conflicts with its long-standing practice under predecessor regulations. Before IIRIRA created the all-purpose term "removal," noncitizens could be either "deported" if they had already entered the United States, or "excluded" if denied admission at the border. *Id.* at 27,586-87. IJs had authority over applications to adjust status filed by noncitizens who were in deportation proceedings under INA §237 but not those filed by noncitizens in exclusion proceedings under §212. *See, e.g.*, *Matter of Manneh*, 16 I.&N. Dec. 272, 274 (1977). Estalita's proceeding was under §237, not §212.

New regulations promulgated in 2006 changed the terminology but retained this basic distinction. *See* 71 Fed. Reg. 27,587-88. When a noncitizen faces the equivalent of exclusion, that is, removal under §212 after having been paroled but not admitted into the United States, an IJ should not adjudicate an adjustment-of-status application. The only removal proceedings here, however, are §237 proceedings, the equivalent of deportation, commenced after Estalita was properly admitted in 2000. Thus, the IJ retains

jurisdiction. *See, e.g.*, *Matter of Roussis*, 18 I.&N. Dec. 256, 257 (1982).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF AMICI CURIAE OF THE JEWISH SOCIAL POLICY ACTION NETWORK, THE CAPUCHIN FRANCISCAN FRIARS OF THE PENNSYLVANIA PROVINCE, LUTHERAN CHILDREN AND FAMILY SERVICE OF EASTERN PENNSYLVANIA, THE PITTSBURGH AREA JEWISH COMMITTEE, HIAS AND COUNCIL MIGRATION SERVICE OF PHILADELPHIA, THE SHALOM CENTER, AND THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Must a noncitizen who has complied with an order to depart be afforded her right, under 8 U.S.C. § 1229a(c)(7)(A), to have her single, timely motion to reopen considered on its merits, notwithstanding 8 C.F.R. § 1003.2(d)?

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INTERESTS OF *AMICI CURIAE*

The Jewish Social Policy Action Network ("JSPAN") is an organization of American Jews that works to protect the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. Our religious tradition teaches us not to oppress the stranger living in our midst for we were once strangers in the land of Egypt. Exod. 23:9. Molded by a 1500 year experience of living as a minority in Christendom and in Islamic societies, American Jews are keenly aware that religious persecution persists. Our interest in this case stems from the desire to assure that those who seek asylum in America may have their cases decided without being forced to go into hiding. As an organization, JSPAN in recent years has authored *amici* briefs in this Court in *Salazar v. Buono*, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010), and *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009), and participated in numerous amici briefs before the lower federal courts.[1]

The Capuchin Franciscan Friars of the Pennsylvania Province are a branch of the Catholic religious Order founded by Saint Francis of Assisi. Saint Francis began a religious Order of priests and brothers to live in humility and to serve

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[1] Counsel of record for all parties received notice at least ten days before the due date of *amici curiae*'s intention to file this brief. Their letters of consent are filed with this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

the poor, the outcasts, and those shunned by society. In recent years, the Capuchins of North America have worked with many immigrants to the United States, offering spiritual and other forms of assistance. In fact, a number of our younger brothers are themselves immigrants.

The Lutheran Children and Family Service of Eastern Pennsylvania is a human service agency that has been dedicated to protecting and empowering vulnerable children and families since its founding in 1922. Working in close partnership with public institutions and faith-based and non-sectarian community organizations throughout the region, LCFS serves over 4,000 clients region-wide without regard to race, religion, national origin, ancestry, gender, disability, age, or sexual orientation. As an affiliate of the national Lutheran Immigration and Refugee Service and as a social ministry organization affiliated with both the Evangelical Lutheran Church in America as well as the Lutheran Church Missouri Synod, we rejoice that our church and country continue to change with the steady arrival of newcomers in the United States who are enriching congregations and communities. We believe in the Biblical mandate to "welcome the stranger."

The Pittsburgh Area Jewish Committee (PAJC), an independent affiliate of the American Jewish Committee, seeks a pluralistic society wherein the rights and dignity of the Jewish people as well as all other religious, cultural, and racial groups are respected and secure. We work hard to insure that the American dream is true for everyone

realizing that we can only secure our rights as American Jews if those rights are afforded to others.

HIAS and Council Migration Service of Philadelphia, a partner agency of the Jewish Federation of Greater Philadelphia, provides legal and social services to a diverse group of 2,000 immigrants and refugees annually. Since our founding in 1882, we have assisted over 300,000 immigrants in our region. We are a non-profit faith-based organization which seeks, through representation, to avoid unjust deportations so that families are preserved, individuals are afforded basic due process protections, and noncitizens are protected from persecution and torture pursuant to international and national human rights law. In the past five years, we have represented scores of individuals before the U.S. Immigration Court, the Board of Immigration Appeals and the federal courts.

The Shalom Center was founded in 1983, bringing wisdom from the Jewish tradition to bear on issues of peace, social justice, and healing of the earth. We have about 3,000 members across the United States and our e-mail lists reach an additional 19,000 people.

The World Organization for Human Rights USA ("Human Rights USA") is a non-profit human rights organization that employs legal strategies to ensure that U.S. law upholds internationally-recognized human rights standards, obtains justice for victims of human rights violations, and punishes the violators. Human Rights USA focuses primarily

on the United States' compliance with international human rights norms, using litigation as the primary tool for securing compliance and for bringing public attention to these problems. Human Rights USA is a member of the World Organization Against Torture, an international network of 297 human rights groups working to protect human rights in their own countries.

BACKGROUND

The Board of Immigration Appeals' categorical bar of motions to reopen or reconsider by aliens no longer in the United States applies to all manner of immigration claims, and the issues raised are of paramount importance to the faith community because of the effects on asylum seekers. The lower court's decision will have harmful ramifications by barring the door to noncitizens who have legitimate claims of religious persecution. As organizations committed to upholding the rule of law of the land, *amici* oppose a rule that closes off avenues of adjudication such as reopening and reconsideration. The regulation at issue effectively asks noncitizens to go into hiding and violate the law in order to preserve their ability to have their cases fully adjudicated. Perversely, refugees who comply with a voluntary-departure order forfeit their right to seek reopening or reconsideration of erroneous removals. An asylum seeker should not be put to this choice. Honoring the law should not come at the cost of forfeiture, and violating the law should not aid in one's legal pursuit of asylum.

ARGUMENT

I. THE PETITION FOR CERTIORARI CONCERNS HUMAN RIGHTS ISSUES OF SIGNIFICANT IMPORTANCE.

A. The United States Plays a Vital Role in Preventing Religious Persecution and Protecting Its Victims.

For hundreds of years America has been a safe haven from religious persecution. Many members of the religions represented by the parties to this brief entered the United States seeking refuge from religious persecution. These religious groups maintain a keen interest in ensuring that victims of religious persecution can continue to seek refuge in the United States.

Grounded in the United States Constitution, the free exercise of religion is of the upmost importance in the United States. Religious freedom is the "rockbed" of this country. 144 CONG. REC. S 11907 (1998) (statement of Sen. Specter). It is the reason that the Pilgrims arrived in the United States in the 1600s, and it is one of the mechanisms through which this country grows and develops. *Id.*

In the enactment of the International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401-6450 (2006), Congress focused on the importance of religious freedom in the United States:

> The right to freedom of religion undergirds the very origin and existence of the United States. Many of our

> Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution. 22 U.S.C. § 6401(a)(1) (2006).

Legislators on both sides of the political spectrum acknowledged the critical need to prevent religious persecution, and protect those subject to such persecution. *See* 144 CONG. REC. S 12091 (1998) (statement of Sen. Ashcroft) (noting that passage of the International Religious Freedom Act was vital because "the United States has a duty to stand for religious liberty abroad as we continue to preserve it at home."); 144 CONG. REC. S 12091 (1998) (statement of Sen. Hatch) (stating that the Act "conscientiously fulfills the Congress's intent to act against one of the most hideous violations of human rights, persecution based on faith."); 144 CONG. REC. S 12091 (1998) (statement of Sen. Feingold) (recognizing the importance of protecting against not only religious persecution, but also other types of persecution faced by others in the world); 144 CONG. REC. S 12091 (1998) (statement of Sen. Biden) (hoping that the Act would "lead to advancement of religious freedom—one of the fundamental human rights—around the world."). Collectively, Congress again reiterated its

ongoing effort to reflect the "unwavering commitment of the United States to religious freedom . . . ." 22 U.S.C. § 6401(b)(3) (2006).

When the Senate passed the Act, Senator Joseph Lieberman shared a poignant story:

> On this day, I think of my grandmother who came here from Central Europe. My grandmother was probably one of the greatest American patriots I ever knew, for a simple reason: She said to me in her old age how much she loved the country. She said, "It may not seem that profound to you, it may not seem that complicated, but the fact I can walk to synagogue on Saturday morning and not only is no one harassing me or bothering me, not only do I live free of fear, not only do I have no hesitation about what I will find in the synagogue, nobody bothering the building or any of us worshipping there, but my neighbors who are not Jewish, as they see me, say "Good morning, Mrs. Manger, good Sabbath to you.'" 144 CONG. REC. S 12091 (1998).

The protection afforded by the United States has similarly affected millions of citizens, and millions more of their ancestors. Because the United States is a place of refuge, millions are able to freely practice their religions, freely display their political affiliations, and freely associate without fear of persecution. The United States' role as a safe haven from all forms of persecution even predates the

Constitution and is central to the nation's identity. It is one of the reasons that America remains exceptional among nations.

Receiving a grant of asylum is neither easy nor guaranteed. In addition to the requirements imposed by statute, refugees must gather evidence that can be difficult to locate and survive in a system that is difficult to navigate even without a language barrier. 8 U.S.C. § 1158(B)(i) (2006) (discussing burden of proof to establish an asylum claim). Despite these hurdles, in 2009, officials granted 47% of all defensive asylum claims, up from 38% in 2005. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). For those filing for affirmative asylum in an immigration court, the 2009 grant rate was 55%, compared to 44% in 2005. *Id.* Over 20,000 individuals have been granted asylum since 1995. Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2009 Yearbook of Immigration Statistics (2010). However, the high ratio of asylum grants is no coincidence—refugees often *do* have legitimate bases upon which to seek refugee status and legally remain in the United States.

The availability of asylum as a tool to prevent religious persecution is of great importance to *amici*. The Petitioner, Indah Estalita, arrived in the United States from Indonesia. As a Christian, she feared religious persecution in a predominantly Muslim country. Although Estalita's first asylum claim was denied, when she reentered the country, immigration officers determined that her fears of persecution were credible and granted her entry to the United States pending a determination of her asylum claim. Indonesia consistently ranks among the top-25

countries for grants of asylum. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). Although asylum may not be the sole basis for Petitioner's request to remain in the United States, the same legal issues would be presented to this Court were she seeking religious asylum or adjustment on other grounds. Resolution of this issue now is hence important for *amici* and the communities they serve.

The United States is at the forefront in the fight against religious persecution. In 1998, with the enactment of the International Religious Freedom Act, Congress created the United States Commission on International Religious Freedom. 22 U.S.C. § 6431 (2006). The Commission is a bi-partisan effort charged with reviewing "the facts and circumstances of violations of religious freedom internationally" and making "policy recommendations to the President, Secretary of State and Congress." United States Commission on International Religious Freedom, *available at* http://www.uscirf.gov/about-uscirf.html.

In addition to other roles, the Commission publishes a yearly report on the status of religious persecution in the world. 22 U.S.C. § 6433 (2006) (authorizing Commission to issue yearly report on religious persecution). The report highlights different incidents of religious persecution each year, but the ultimate message behind the report does not change: religious persecution continues to be an issue of serious concern.

The Commission's 2010 report documents incidents of religious persecution occurring in 28 nations. United States Commission on International

Religious Freedom. *See* United States Commission on International Religious Freedom, Annual Report 2010, *available at* http://www.uscirf.gov/images/annual%20report%202010.pdf. As the Commission recognizes, religious persecution remains a concern for many countries and religions: Coptic Christians, Baha'is, and Muslim minority groups in Egypt; Jews and Catholics in Venezuela; Buddhists and Protestants in Vietnam; and Christians and Muslims in Sudan and India, among many others. *Id.* In one 2010 incident, over 500 people living in a Christian community were killed as part of Nigeria's religious uprisings. *Id.* In another incident in 2009, 900 members of an Islamic sect were killed in conjunction with the sect's attempt to further its mission. *Id.*

Religious minorities such as these and others should not be forced to return to countries where their lives, both religious and otherwise, would be put in peril, until they have an opportunity to exhaust their legal rights. The post-departure bar has the perverse effect of shutting the door to asylum seekers who, despite the desperate nature of their situation, simply desire to utilize the appropriate legal channels for remaining in the United States.

B. This Court Should Resolve an Issue that Affects All Refugees in This Country.

Immigration officials commenced an increasing number of removal proceedings during 2009, as compared to the past four years. U.S. Dep't of Justice Statistical Yearbook, Fiscal Year 2009 (2010). As immigration officials commence more removal proceedings, the need to protect refugees' rights simultaneously increases. Motions to reopen or

reconsider are one such vital procedural mechanism designed to protect the rights of refugees. Refugees frequently take advantage of the right to file such motions, as refugees filed over 7,000 motions to reopen or reconsider in 2009. *Id.* All refugees should have the right to file a motion to reopen or reconsider, and in doing so, ensure that the BIA determines their motion on the merits, not on jurisdictional grounds.

The administrative adjudicatory system in this country is a model of excellence, but it is not a model of perfection. The procedures mandated by statute are designed to compensate for mistakes and new developments, and provide litigants with additional opportunities to ensure fair adjudication of their claims. Particularly in an asylum case, a refugee should not be forced back to his or her country of origin and face possible danger until our administrative agencies and courts can actually adjudicate the refugee's claim.

II. THE CIRCUIT SPLIT HAS CREATED PRACTICAL CONSEQUENCES THAT REQUIRE THIS COURT'S RESOLUTION.

Refugees who enter the United States should receive equal treatment. Their claims should be adjudicated under the same, predictable standards. The only criteria for deciding a motion to reopen or reconsider should be the merits of the particular motion. Geographic variances should not—as they currently do—dictate whether a motion to reopen will be granted.

The lack of uniformity among the courts of appeals has produced significant confusions. The

current circuit split leaves thousands of immigrants and their similarly confused attorneys, especially those with a national practice, left to play a guessing game. The confusion only further complicates the already challenging maze of immigration laws. *See Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (Cabranes, J.) (noting the "labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); *Castro-O'Ryan v. U.S. Dep't of Imm. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting E. Hull, *Without Justice For All* 107 (1985) (stating that "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'").

Another consequence of the split is the alarming statistical disparities it creates. If the First, Second, Third, Fifth, Tenth, or Eleventh Circuits decided a particular case on this issue, their decisions, in practice, would be identical. An identical but opposite decision would be reached if the Fourth, Sixth, Seventh, or Ninth Circuits decided the same case. Of all asylum claims filed in 2009, approximately 54% were filed in the First, Second, Third, Fifth, Tenth, and Eleventh Circuits and approximately 43% were filed in the Fourth, Sixth, Seventh, and Ninth Circuits. The Courts of Appears involved in this circuit split hear 97% of all asylum claims. Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2009 Yearbook of Immigration Statistics (2010). Because of the split, whether a refugee's motion will be heard is determined by where he or she entered the United States to seek

affirmative asylum or where he or she sought defensive asylum. Thus, the stark split provides arbitrary results for asylum seekers who are at the mercy of whichever region of the United States they happen to enter.

Because the circuits that are split on this issue decide asylum cases at a similar rate, almost half of the refugees in this country are subject to one set of rules, while the other half of refugees are subject to another set of rules. It is both impractical and unfair that identically situated refugees can be made to suffer different consequences based solely on accidental geographic variances. In this area of the law, laden with enormous consequences, consistency in the application of the law is essential. Refugees have a single opportunity to have their claims re-heard: a motion to reopen or reconsider under 8 C.F.R. § 1003.2 (2006). Resolution of these motions should not be based solely on happenstance of geography.

III. THE TENTH CIRCUIT'S READING OF THE REGULATIONS PRODUCES ILLOGICAL CONSEQUENCES.

The Tenth Circuit's holding is fundamentally at odds with the purposes of this country's immigration laws, which in turn reflect America's long tradition as a safe haven from religious persecution. Immigration laws aim to protect those refugees in need of protection, but at the same time, provide a rigid set of guidelines for refugees to follow. Refugees who violate any of an array of laws lose protection from the immigration laws. 8 U.S.C. § 1182(a)(6), (9) (2006) (detailing grounds that prevent

reentry into the United States including prior illegal entry into the United States, failure to appear at removal proceedings, and previous removal from the United States under 8 U.S.C. § 1229a (2006)).

The Tenth Circuit's approach encourages the type of unlawful behavior that the immigration laws seek to prohibit. Under the Tenth Circuit's view, a person who complies with a voluntary departure order loses the right to have the BIA reopen his or her immigration case. The sole avenue, then, for a person in receipt of a voluntary departure order to guarantee the possibility of review is to defy the order and hide in the United States in violation of the law. In other circumstances, a refugee's failure to comply with a departure order would subject the refugee to automatic deportation. It is impractical and illogical, then, that refugees who violate the law are those who may receive review of motions to reopen. It should not be that an asylum seeker has to violate the law in order to seek the law's full protection.

Those who comply with voluntary departure orders, on the other hand, face grave consequences. Compliance with a voluntary departure order subjects a refugee to the same persecution from which he or she initially sought refuge. The asylum laws in this country seek to protect those in need from various types of persecution. By forcing individuals to return to their country of origin, and at the same time surrender their opportunity to seek relief in the Untied States, the Tenth Circuit's ruling undermines the purpose behind asylum and the recognized importance of religious freedom in this country.

In this sense, a voluntary departure order is no different than an involuntary one, because they both compel refugees to leave and put them at risk of returning to the persecution from which they initially sought asylum. Refugees with a pending motion to reopen or reconsider, face a Catch 22: defy the voluntary departure order, remain in the country, seek hiding, and violate the law, or comply with the departure order, leave the country, and forfeit the right have the BIA reopen or review their claims. This Court's resolution is necessary to right this wrong.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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